

DECISION



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

51012

FILE: B-183434

DATE: August 26, 1975

MATTER OF: Dumont Oscilloscope Laboratories, Inc.

97454

DIGEST:

Where receipt of letter unequivocally advised protester of Army's intent to procure competitor's equipment and that protester's equipment was considered unacceptable, protest to GAO filed 8 working days later is untimely. Under 4 C.F.R. § 20.2(a) (1974) protest was required to be filed not later than 5 working days after basis for protest was known or should have been known. Knowledge of basis of protest occurred upon protester's receipt of Army letter, not when protester later learned that modification of purchase order had actually been issued by Army.

Dumont Oscilloscope Laboratories, Inc. (Dumont), protested to our Office on March 14, 1975, against what it described as the sole-source procurement of a quantity of oscilloscopes from Tektronix, Inc., by the Department of the Army. The protester contended that United States Army Missile Command personnel had made representations to it over a period of time during 1974 that Dumont would receive the award, and that it had expended in excess of \$100,000 in procurement of components and parts based on these representations. Dumont contended that the procurement from Tektronix was, therefore, a breach of its agreement with the Army and suggested that as a certified small business and labor surplus area concern it was entitled to its fair share of Government oscilloscope procurements.

Subsequently, the Army's June 20, 1975, report to our Office responding to the protest questioned whether Dumont's protest was timely filed. The Army report pointed out that the Dumont and Tektronix oscilloscopes were tested and evaluated between November 1974 and February 1975. The report also included a copy of an Army letter dated February 28, 1975, which responded to a Dumont inquiry on the status of the procurement. This letter advised Dumont that after a thorough evaluation, the Army had determined to procure the Tektronix oscilloscope, and that the Dumont oscilloscope was considered unacceptable.

Dumont through its counsel submitted written comments on the Army's report, which, however, did not contain any indication of the date when the Army's February 28, 1975, letter had been received by Dumont. Our Office then requested Dumont's counsel to advise us when the February 28, 1975, letter had been received by Dumont. Counsel's reply stated that it had been received on March 4, 1975. Counsel further stated:

"* * * As stated in that letter, the Dumont 1100P scope was rejected as an alternative to the Tektronix 465 because of an absence of reliability data. However, the rejection of the 1100P did not have critical significance so long as Dumont's 765 scope was still being considered for the procurement in question. Thus, the event which gave rise to Dumont's protest was the modification of the original purchase order, replacing Dumont for Tektronix as the sole source for the procurement. Prior to the modification of the purchase order, Dumont's 765 was, theoretically at least, still in the running for the procurement. Once Tektronix was selected as the sole source and the Dumont 765 thereby eliminated, the rejection of Dumont's 1100P (as well as the preclusion of Dumont's 765) became actionable for purposes of a protest to your Office. Since the replacement of the 765 did not occur until March 8, 1975, and was not made known to Dumont until the following day, Dumont's protest to your Office on March 14, 1975, was timely for all purposes."

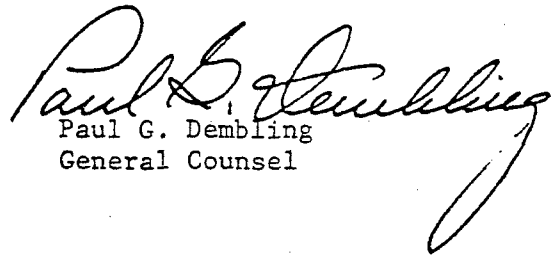
With the exception of protests based upon apparent solicitation improprieties, our Bid Protest Procedures and Standards which were in effect at the time in question provided that protests be filed within 5 working days after the basis for protest was known or should have been known. See 4 C.F.R. § 20.2(a) (1974).

It is undisputed that Dumont had knowledge by March 4, 1975, of the Army's intention to procure Tektronix oscilloscopes. Examination of the Army's February 28, 1975, letter indicates that its language is unequivocal and contains no indication that further consideration would be given to procuring Dumont's product. We further note that the representations by Army personnel that Dumont equipment would be procured allegedly took place in 1974. Upon receiving the Army's February 28, 1975, letter, Dumont therefore knew or should have known the basis for its protest. In this regard, since our Bid Protest Procedures and Standards speak of knowledge of the basis for protest as the pertinent criterion, rather than the date on

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which the agency's protested action is consummated, we see no merit in the above argument presented by counsel for Dumont.

In view of the foregoing, it is clear that Dumont's protest to our Office should have been filed not later than March 11, 1975. Accordingly, Dumont's protest filed on March 14, 1975, is untimely and not for consideration.


Paul G. Dembling
General Counsel