

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548FILE: B-186719 DATE: September 20, 1976
MATTER OF: Power Conversion, Inc.

61513

98010

DIGEST:

1. Offeror, whose proposal under RFP had been determined unacceptable, protested prior to award but more than 10 working days after being informed of bases for unacceptability determination and that debriefing could not be held until after award. Protest is untimely since circumstances indicate that protester was sufficiently apprised of reasons for unacceptability that it knew or should have known bases of protest. Moreover, consultation with counsel prior to filing protest is not valid basis for extending 10-day time limitation.
2. There is no requirement that agency inform offeror in solicitation or in preaward letter notifying offeror that its proposal is unacceptable that it has 10 working days to protest to our Office in order for protest to be considered timely. In any case, since Bid Protest Procedures have been published in Federal Register, protesters must be charged with constructive notice of their provision.
3. Alleged lack of prejudice to agency or other parties due to untimely filing of protest; receipt of GAO's standard acknowledgment letter by protester; and GAO's alleged failure to promptly notify protester that protest appeared untimely do not form basis for consideration of protest on merits.
4. Since there is no indication that supervening circumstance, beyond protester's control, prevented protester from filing timely protest no "good cause" has been shown under section 20.2(c) of Bid Protest Procedures such as to allow consideration of untimely protest on merits.
5. Untimely protest concerning elimination of one offeror from competitive range in particular procurement does not involve "issues significant to procurement practices or procedures" under section 20.2(c) of Bid Protest Procedures such as to allow consideration of protest on merits.

U98010-098010

B-186719

By letter dated June 9, 1976 (received June 10, 1976), counsel for Power Conversion, Inc. (PCI), protested to our Office against the rejection of its proposal under request for proposals F33615-76-R-5261, issued by the Department of the Air Force, Wright-Patterson Air Force Base, Ohio. The RFP solicited proposals for a manufacturing process for standard cells of lithium-sulfur dioxide batteries. No award has yet been made.

PCI had been notified by the Air Force in a letter dated May 13, 1976 (received by PCI on May 20, 1976), as follows:

"1. Your offer submitted in response to the subject Request for Proposal has been evaluated and it has been determined that other proposals more nearly reflect the requirements of the Government in this instance.

"2. The proposal did not sufficiently justify the techniques for the hermetic seal and vent design. The vent design is unproven and would be difficult to use with the smaller cell sizes. The proposal did not show how the manufacturing technology developed during the progress of the program would be utilized in production of high quality hermetically sealed Li-SO₂ cells.

"3. You are advised that negotiations are not contemplated with your company concerning the subject RFP. A subsequent revision of your proposal will not be considered. * * *"

On May 24, 1976, PCI requested of the Air Force a debriefing, which was denied pursuant to Armed Services Procurement Regulation (ASPR) § 3-508.4(b) (1975 ed.) because no award had yet been made under the RFP.

PCI's counsel was informally told by a representative of our Office shortly after the protest was filed that the protest appeared to be untimely. At PCI's request, a conference was held at our Office on the issue of the timeliness of its protest. Also, PCI was given an opportunity to submit written comments on why our Office should consider the protest on the merits.

Section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2) (1976), states in pertinent part:

B-186719

"* * * bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

Although the May 13 letter generally informed PCI of the rejection of its proposal, PCI basically argues that its protest should be considered timely under the foregoing rule as the basis of protest became known to it "with certainty only after * * * [it] conferred with counsel. counsel took the matter under advisement, and after studying, inter alia, the subject solicitation, * * * [its] proposal in response to the solicitation, [and] communications between the contracting officer and * * * [PCI] subsequent to the submission of the proposal * * *." Implicitly, PCI also contends that it was entitled to wait to file a protest until after a debriefing, which has not yet occurred.

With regard to the latter point, in Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312, we held that a protester could reasonably withhold filing a protest to our Office until it had a debriefing conference with the procuring agency to find out the specific reasons why award was made to another offeror. That case involved a protest arising out of a post-award examination of the successful offer after which the agency debriefed the protester just 7 calendar days later as to why it had selected the other offeror's allegedly deficient proposal.

However, in a preaward situation, ASPR § 3-508.4(b) (1975 ed.) states in pertinent part:

"* * * Debriefings shall be provided at the earliest feasible time after contract award. * * *"
(Emphasis supplied.)

Therefore, the Air Force properly denied the request for a debriefing. See EDMAC Associates, Incorporated, B-182613, April 4, 1975, 75-1 CPD 20

Also, unlike the situation in Lambda, we do not believe PCI could await the post-award debriefing before protesting to our Office and still be considered timely. As noted above, the Air Force advised PCI on May 20, 1976, of the unacceptability of its proposal and the reasons therefor. While PCI has contended that the Air Force letter did not adequately apprise PCI that it had a basis for protest, we note that when the request for the debriefing was denied, PCI indicates that it responded to the effect that it was going to formally protest the rejection of its proposal. Furthermore, in its initial protest letter

B-186719

to our Office, prior to the question of timeliness being raised, and more than 10 working days after being told it could not be debriefed until after award and without awaiting a post-award debriefing, PCI responded in some detail to the Air Force's reasons for rejecting its proposal. Consequently, notwithstanding PCI's assertions to the contrary, we believe PCI was sufficiently apprised of the reasons for rejection of its proposal that it knew or should have known its bases for protest upon receipt of the May 13 letter. Moreover, we do not regard PCI's consultation with counsel prior to filing a protest as being a valid basis for extending the 10-day time limitation required by our procedures. See R. G. Robbins & Company, Inc., B-184265, July 18, 1975, 75-2 CPD 51.

Since PCI did not protest to our Office within 10 working days of being notified that its proposal would not be further considered, it is our conclusion that PCI's protest must be considered untimely.

PCI also claims that the Air Force was required to inform PCI that it had 10 working days to protest to our Office in the solicitation or at least in the letter notifying PCI that its proposal was unacceptable. However, no such requirement exists in law or regulation. See Save our Aerospace Program, Inc., B-184922, November 12, 1975, 75-2 CPD 299. In any case, since our Bid Protest Procedures have been published in the Federal Register (40 Fed. Reg. 17979, April 24, 1975), protesters such as PCI must be charged with constructive notice of their provisions. Dewitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47; Art Metal - U.S.A., Inc., B-184411, August 29, 1975, 75-2 CPD 132; Twycroft, Inc., B-185126, December 23, 1975, 75-2 CPD 408.

PCI also contends that neither the Air Force nor any other party has been prejudiced by PCI's failure to submit a protest within 10 days of receipt of the May 13 letter because no award has yet been made and the procurement cannot reasonably be regarded as urgent. PCI also notes that the Air Force has not alleged that it was prejudiced in any way by this delay. Consequently, PCI asserts that we should exercise the discretion it alleges we possess under our Bid Protest Procedures, and consider PCI's protest on the merits. PCI also states that we should consider the protest because of the acknowledgment letter we sent to PCI.

B-186719

and since we did not tell PCI that there was any problem regarding the timeliness of its protest until 3 weeks after filing.

None of the foregoing arguments forms a basis for consideration of PCI's protest on the merits. See Leasco Information Products, Inc., 53 Comp. Gen. 932 (1974), 74-1 CPD 314; Cessna Aircraft Company; Beech Aircraft Corporation, 54 Comp. Gen. 97 (1974), 74-2 CPD 91; Art Metals - U.S.A., Inc., supra. In this regard, we have stated:

"* * *the principles embodied in the timeliness standards of our Bid Protest Procedures * * * reflect our long experience with two sometimes conflicting considerations--the problem of providing protesters and interested parties a fair opportunity to present their cases on the one hand and the problem of attempting to resolve bid protests in a reasonably speedy manner on the other. See the preamble to our protest rules. To these ends, we recognized, even before the adoption of our current procedures, that unjustified delays in the presentation of issues by parties--such as allegations of solicitation improprieties raised long after bid opening--were a factor to be taken into consideration in resolving protests. See, for example, 50 Comp. Gen. 565, 576 (1971). * * *" Leasco, supra at 948.

"We do not regard our timeliness standards as technicalities. To raise a legal objection to the award of a Government contract is a serious matter. At stake are not only the rights and interests of the protester, but those of the contracting agency and other interested parties. Effective and equitable procedural standards are necessary so that parties have a fair opportunity to present their cases and protests can be resolved in a reasonably speedy manner. See 53 Comp. Gen. 932, supra. In this context, our rules impose strict time standards and are strictly construed. See, for example, B-181005, B-181006, May 21, 1974, and B-181127, May 16, 1974, where protests filed 6 working days after knowledge of the basis of protest were rejected as untimely. In short, we see no merit in the protester's argument that the issue involved justifies disregarding our timeliness standards." Cessna, supra, at 111.

B-186719

Moreover, although we make every effort to expeditiously dispose of untimely protests, there is no requirement that untimely protesters be orally notified of a tentative determination in this regard prior to the issuance of a decision. Also, our standard acknowledgment letter, which is mailed to protesters as a matter of course when our Office receives a protest, does not preclude us from declining to consider an untimely protest. See Marina Social Security Building Committee, B-183421, August 8, 1975, 75-2 CPD 95. In any case, PCI has been given a complete opportunity to show why its protest should be considered on the merits.

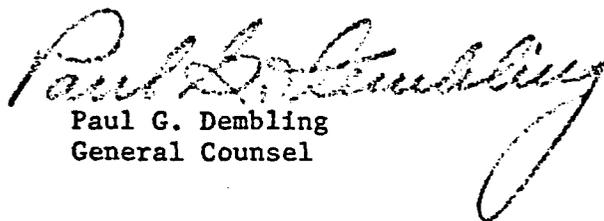
As noted by PCI, our Bid Protest Procedures allow for certain exceptions. That is, section 20.2(c) states:

"The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely."

"Good cause" generally refers to some compelling reason, beyond the protester's control, which prevented it from filing a timely protest. 52 Comp. Gen. 20, 23 (1972); Leasco, supra, at 947. There is no indication that any supervening circumstance prevented PCI from filing a timely protest.

We have recognized that "issues significant to procurement practices or procedures" are limited to those issues of widespread interest to the procurement community generally. 52 Comp. Gen. 20, 23; Leasco, supra, at 947-948; Fairchild Industries, Inc., B-184655, October 30, 1975, 75-2 CPD 264; COMTEN, B-185394, February 24, 1976, 76-1 CPD 130. We do not regard a protest concerning the elimination of one offeror from the competitive range in a particular procurement to involve any "significant issues."

In view of the foregoing, we decline to consider PCI's protest on the merits.


Paul G. Dembling
General Counsel