

DECISION

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

25789

FILE: B-211092

DATE: July 21, 1983

MATTER OF: WGBH Educational Foundation

DIGEST:

Protest that sole-source award of contract was improper is untimely where filed approximately 1 month after date of publication in Commerce Business Daily (CBD) of notice that sole-source negotiations were being conducted, since protester is charged with constructive notice of CBD announcement and protest was not filed within 10 working days after basis of protest was known or should have been known. 4 C.F.R. § 21.2(b)(2) (1983).

WGBH Educational Foundation (WGBH) protests the sole-source reprocurement and award of contract No. 300-83-0140 by the Department of Education to the National Captioning Institute (NCI). The contract is for the production of closed-captioned films for the hearing impaired and was awarded to NCI after the Department of Education terminated WGBH's contract for the convenience of the Government. WGBH contends that it should have been given an opportunity to compete with NCI for the award of the new contract.

For the reasons stated below, the protest is dismissed.

WGBH filed its protest with our Office on March 11, 1983. Counsel for NCI has indicated that notice that sole-source negotiations were being conducted with NCI and the contract subject matter was synopsisized in the Commerce Business Daily (CBD) on February 11, 1983.

Our Bid Protest Procedures require that protests be filed with the General Accounting Office or the contracting agency within 10 working days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2) (1983).

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WGBH contends that it never received actual notice of the Department of Education's intent to conduct sole-source negotiations with NCI since WGBH was not and is not a subscriber to the CBD. However, this Office has held that the publication of a procurement in the CBD constitutes constructive notice of such information to all parties. Micro Mill Inc., B-202703, May 1, 1981, 81-1 CPD 335; Manville Building Materials Corp., B-210414, March 15, 1983, 83-1 CPD 258. Accordingly, WGBH is charged with notice of the decision to negotiate on a sole-source basis with NCI. Welbilt Electronic Die Corporation, B-208227, October 12, 1982, 82-2 CPD 326. Thus, its protest concerning this matter filed approximately 1 month after WGBH knew or should have known the basis for its protest is untimely.

WGBH further contends that even if its protest was untimely based on the CBD publication date, WGBH was misled by the Department of Education with respect to its intention to solicit WGBH and this fact requires that WGBH's protest not be dismissed as untimely. However, in the absence of probative evidence of a conscious or deliberate intention to impede the participation of WGBH or prevent WGBH from learning about the agency's intent to make a sole-source award to NCI, we cannot disregard our protest standards. Although, in Non-Linear Systems, Inc., B-182636, February 12, 1975, 75-1 CPD 91, we did review the substance of a protest where the protester had alleged that the agency had made an express commitment to solicit the firm, we did so primarily because that case was fully developed and considered on the merits prior to the timeliness issue being raised. In this regard, our revised procedures presently provide that:

"* * * When the propriety of dismissal becomes clear only after information is provided by the agency or is otherwise obtained by the Office of General Counsel, the protest shall be dismissed at that time. * * *" 48 Fed. Reg. 1932 (1983) (to be codified 4 C.F.R. § 21.3(9)).

It is clear that at whatever stage we are apprised of facts warranting dismissal, the proper course is to dismiss the protest. Sea-Land Service, Inc.-Reconsideration, B-208690.3, April 13, 1983, 83-1 CPD 393.

Furthermore, we note that the conversations between WGBH and the Department of Education which form the basis

for WGBH's allegations concerning misrepresentation apparently took place on or about January 21, 1983. Assuming that WGBH reasonably believed at that time that it would be given an opportunity to compete for the reprocurement, WGBH was thereafter put on constructive notice as of the date of the February 11, 1983, CBD publication date that the Department of Education was proceeding to award the contract on a sole-source basis rather than reprocure competitively. Consequently, we find no basis upon which to review the merits of WGBH's complaint and the protest is dismissed.

WGBH also protests that the contracting officer accepted NCI's proposal containing fixed unit prices without any finding as to the amount of profit included in those prices. Since we find WGBH's protest of the propriety of the sole-source award to be untimely, we do not view WGBH as an interested party to protest what occurred during negotiations. Mosler Systems Division, American Standard Company, B-204316, March 23, 1982, 82-1 CPD 273.

Harry R. Van Cleve
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Acting General Counsel