



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Data Processing Services  
File: B-225443.2  
Date: December 18, 1986

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### DIGEST

1. Protest filed in General Accounting Office more than 10 days after protester knew basis for protest is untimely. Oral complaint to contracting agency did not constitute timely protest since Federal Acquisition Regulation no longer provides for oral protests.
2. Protester's lack of knowledge concerning filing deadlines is not a basis for waiving timeliness requirements, since prospective contractors are on constructive notice of Bid Protest Regulations.

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### DECISION

Data Processing Services (DPS) requests reconsideration of our dismissal of its protest under United States Forest Service solicitation No. R6-86-155S as untimely. We affirm our dismissal of the protest.

DPS initially wrote two identical letters of protest, one addressed to the Forest Service and the other to the General Accounting Office (GAO). The protester then apparently mailed the letter addressed to the Forest Service to GAO while mailing the letter addressed to GAO to the Forest Service.

The protest letter addressed to the Forest Service was received in our Office on October 1; we viewed it as an information copy of a protest filed with the agency. We first received the protest addressed to our Office on October 30, when it was forwarded to us by the Forest Service. We dismissed the protest as untimely because it was not filed within 10 working days of the date the basis for protest was known or should have been known, as required by 4 C.F.R. § 21.2(a)(2) (1986).

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DPS initially protested against "the bidding procedures which occurred [at bid opening] on September 5, 1986, and the acceptance of a late bid at said bid opening submitted by Portland Mailing Services [PMS]." The protester stated that representatives from DPS and PMS were present at bid opening. According to the protester, PMS representatives arrived approximately 10 minutes before the scheduled bid opening time of 2 p.m. on September 5, but did not present their bid until 20 seconds after the 2 p.m. deadline. DPS contended that the Forest Service's acceptance of the allegedly late bid was improper. The protester also contended that PMS' bid was nonresponsive because its price was unreasonably low.

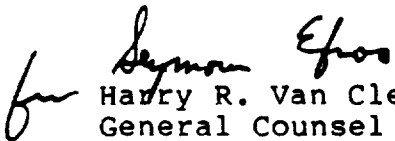
In its request for reconsideration, the protester describes telephone discussions it had with the contracting officer on September 8 and 12. DPS states that the contracting officer indicated that a protest could be filed before or after award, and that no apparent low bidder had been established at the time of these conversations. Furthermore, DPS alleges that it was advised by another Forest Service employee on September 24 that "there were not any time restrictions" within which a protest must be filed, and that the Forest Service employee specifically stated that a protest presented to the agency by September 30 would be considered. DPS argues that "reconsideration of [the] dismissal is warranted--in light of the constant communications between Data Processing Services and the U.S. Forest Service personnel."

The record contains conflicting statements about when the protester knew that the Forest Service was considering PMS' bid for award. The agency report states that DPS was advised on September 11 that it was considering PMS' bid. In its request for reconsideration, however, the protester alleges that it was not aware that the contract could be awarded to PMS until September 24. However, we find that the basis for protest arose on September 5, when the Forest Service physically accepted PMS' bid. Under the Federal Acquisition Regulation, 48 C.F.R. § 14.304-3 (1985), late bids that are not considered for award must be held unopened, unless opened for identification, until after award. Here, PMS' bid was placed with the other bids when it was submitted and apparently was opened along with the others. The protester's knowledge of the amount of PMS' bid further suggests that the disputed bid was opened and read with the others. Even DPS' own statement in its initial protest identifies the basis for protest as "bidding procedures which occurred on September 5, 1986." We therefore conclude that the 10-day period within which DPS was required to file its protest began on September 5, and affirm our prior conclusion that the protest filed here on October 30 was untimely. We also point out that the result would be the same even if we viewed the letter we received on October 1 as a protest to us.

We further point out that to the extent DPS characterizes its contacts with Forest Service personnel as a verbal protest, this also does not change the result here. Although our regulations permit a protest to be filed initially with the contracting agency, an oral complaint to the agency does not constitute a protest for purposes of this provision. Oral protests are no longer authorized under the Federal Acquisition Regulation. See 48 C.F.R. § 33.101 (1985); K-II Construction, Inc., B-221661, Mar. 18, 1986, 65 Comp. Gen. \_\_\_\_, 86-1 CPD ¶ 270.

To the extent that DPS was misled by the agency's information about protest filing requirements, this does not alter the untimeliness of the protest. (We note that the Forest Service contends that the Forest Service official who spoke to a DPS representative on September 11 informed him of the correct procedures for filing a protest in GAO.) A protester's lack of actual knowledge of our regulations is not a defense to dismissal of its protest as untimely. Prospective contractors are on constructive knowledge of our Bid Protest Regulations, since they are published in the Federal Register and Code of Federal Regulations. See Kenneth J. Pedersen, B-222891, May 6, 1986, 86-1 CPD ¶ 440. Moreover, the timeliness requirements of our Bid Protest Regulations may not be waived by actions taken by the contracting agency. See Auburn Timber, Inc.--Request for Reconsideration, B-221523.2, Feb. 20, 1986, 86-1 CPD ¶ 182; BHT Thinning, B-217105, Jan. 16, 1985, 85-1 CPD ¶ 44.

Therefore, we affirm the dismissal of DPS' protest.

  
Harry R. Van Cleve  
General Counsel