



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Whelen Engineering Company

File: B-239189

Date: August 1, 1990

Charles Phelps, for the protester.
James E. Biersach, for Alerting Communicators of America,
an interested party.
L. James Tillman, Department of Energy, for the agency.
Sabina K. Cooper, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Protest is untimely where filed more than 10 working days
after the basis of protest, an alleged improper demonstra-
tion of another offeror's product, is known.

DECISION

Whelen Engineering Company protests the award of a contract
to Alerting Communicators of America (ACA) under solicita-
tion No. BP2-XK270-47, issued by Martin Marietta Energy
Systems, Inc., pursuant to its operation and management
contract with the Department of Energy (DOE), for an offsite
alerting and notification system (ANS) for the Oak Ridge
National Laboratory. Whelen asserts that an improper onsite
demonstration of ACA's product prejudiced Whelen, and that
Whelen was not formally notified of the award of the
contract.

We dismiss the protest.

The solicitation, issued on December 15, 1989, sought offers
to supply an offsite public warning system, including
related data, installation and training, to a plant operated
by Martin Marietta. Three options provided for offsite ANS
systems to be installed around another DOE plant and other
offsite locations. The solicitation included a detailed
technical specification and provided for award to the
responsible offeror whose offer, conforming to the solicita-
tion, would be most advantageous to Martin Marietta, the
total cost of the acquisition and other factors considered.

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Martin Marietta received offers from Whelen and ACA by the February 21, 1990, closing date for receipt of offers. Whelen indicated in its cover letter to its offer that it was submitting an "alternative proposal to the project specifications." The letter further stated, "With all due respect to Martin Marietta Energy Systems, Inc., we believe that the system you have specified will not work." (Emphasis in original.) Martin Marietta determined that Whelen's offer was technically unacceptable and awarded a contract to ACA, the low offeror, on March 28.

Whelen filed a protest in our Office on April 5, arguing that a March 5 demonstration test of an exterior public address system at Martin Marietta's facility using an ACA speaker unit was improper. Whelen states that Martin Marietta emphasized to all vendors at the preproposal conference that their only contact regarding the procurement should be through Martin Marietta's Purchasing Department, and, therefore, the ACA demonstration, which Whelen learned of on March 20, put Whelen at a disadvantage.

We find Whelen's protest to be untimely. Under our Bid Protest Regulations, protests, other than those based upon alleged improprieties in a solicitation, must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1990). Whelen's own protest letter acknowledges that the firm learned of the basis of its protest, the demonstration of the ACA equipment by Martin Marietta, on March 20. Whelen did not file its protest in our Office until April 5, more than 10 working days following the allegedly improper demonstration.

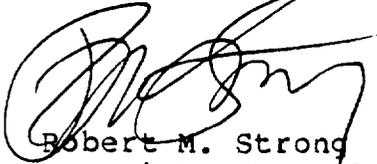
With respect to the timeliness of its protest, Whelen contends that an employee in the Atlanta, Georgia, Office of the General Accounting Office (GAO) misinformed the firm as to the timeliness requirements for the filing of bid protests. Whelen's account of its alleged conversation with the GAO employee is nonspecific, and therefore we are not able to determine whether anyone in our Office in fact provided the allegedly erroneous advice. However, a protester is on constructive notice of the rules concerning the proper time for filing a protest since our Bid Protest Regulations are published in the Federal Register and appear

in the Code of Federal Regulations, even where allegedly erroneous information about protest procedures is provided by a government agency. Garden State Brickface & Stucco Co., B-237153, Oct. 31, 1989, 89-2 CPD ¶ 410.

In any event, Whelen's offer, by its own admission, did not conform to the requirements of the solicitation and, therefore, was technically unacceptable. Moreover, Martin Marietta asserts that the test of the ACA equipment referred to by Whelen was held to determine the capability of the speaker to perform as an exterior public address system onsite, rather than offsite, as was required for the subject procurement and, in any case, the test was not conducted until March 5, after Whelen's offer was determined to be technically unacceptable on March 1. Accordingly, we find no evidence of bad faith on the part of Martin Marietta with respect to consideration of Whelen's offer.

Whelen also contends that it was not given formal notification of award. The solicitation stated that unsuccessful offerors would be notified of the award and award amount upon request. Whelen contacted Martin Marietta on April 2, and was informed that award had been made on March 28. Whelen was informed of the award amount on April 10. Accordingly, Whelen's contention in this regard is academic.

The protest is dismissed.



Robert M. Strong
Associate General Counsel