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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

## Decision

**Matter of:** Frank A. Bloomer--Agency Tender Official

**File:** B-401482

**Date:** July 20, 2009

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Debra J. Talley, Esq., Department of the Army, for the protester.  
William H. Venema, Esq., Epstein Becker Green Wickliff & Hall, P.C., for The Ginn Group, Inc., an intervenor; and Diana Price, Esq., American Federation of Government Employees, for Don Hale, designated employee agent, an intervenor.  
Lt. Col. Vince T. Vanek and Daniel DiPaola, Esq., Department of the Army, for the agency.  
Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest alleging violation of procurement integrity is dismissed where the protester did not report the alleged procurement integrity violation to the contracting agency within 14 days after the protester received the evidence that it believed showed a possible violation, because timely reporting is required as a condition precedent by the statutory procurement integrity provisions and GAO's Bid Protest Regulations.

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### **DECISION**

Frank A. Bloomer, Agency Tender Official (ATO), protests the Department of the Army's award of a contract to The Ginn Group, Inc. (Ginn) to perform directorate of public works (DPW) functions at the United States Army Garrison at West Point, New York, following a public-private competition conducted under Office of Management and Budget (OMB) Circular A-76. The ATO alleges that Ginn obtained confidential information about the public tender from a private consultant who had assisted the ATO in preparing the most efficient organization (MEO), in violation of statutory procurement integrity provisions.

We dismiss the protest as untimely because the allegations were not raised within the time required by the statutory procurement integrity provisions as a condition precedent to our considering these allegations.

## BACKGROUND

On September 27, 2006, the Army announced a public-private competition to decide whether to perform DPW functions at the West Point Army Garrison with government employees in an MEO, or to procure these services from a private-sector firm. To assist the ATO in preparing a public tender, on June 8, 2008, the Army retained as a consultant, CACI, Inc.–Federal. CACI performed these consulting services using two individuals: one CACI employee, and one employee of a subcontractor, Creative Facility Management (CFM). Both individuals signed statements recognizing a duty not to disclose information about the public tender, and to report any potential conflicts of interest.

On September 2, 2008, the Army issued request for proposals No. W912SU-08-R-0001, seeking proposals to perform the DPW functions. On November 24, 2008, the ATO submitted a timely public tender in response to the solicitation.

At some point in the fall of 2008, and again on or about January 24, 2009, the CFM consultant and an employee of Ginn were paired together on two golf outings. Protest exh. B (Decision on Agency Protest) at 2. These golf pairings of the CFM consultant and the Ginn employee, which the ATO learned of on January 26, ultimately led to questions about whether there were improper communications between the two—presumably during the golf outings—that had an effect on this procurement. These questions resulted in an investigation by the Army.

According to the Army, its investigation has shown that the only substantive communications about the A-76 competition were brief comments to the effect that Ginn had submitted a competing proposal and intended to win the contract. According to the ATO, subsequent events during the procurement suggest that the consultant provided confidential information about the structure of the MEO and its proposed costs.

On March 4, the Army opened discussions with all competitors, including the ATO and Ginn. Protest exh. E, E-mail from Contracting Specialist to ATO, Mar. 16, 2009, at 1. The ATO submitted a revised public tender, and Ginn submitted a final proposal revision (FPR), by the due date of March 17.

On March 25, the Army announced its tentative decision to award a contract for the DPW function to Ginn. Protest exh. F. During the public review period that followed, the ATO requested information from the Army about the Ginn proposal. In response to the ATO's request, on April 7 the Army provided a CD-ROM with cost information about the Ginn proposal to the ATO's legal counsel, who immediately forwarded it to the ATO. On April 13, consultants retained by the ATO who had reviewed the files on the CD-ROM informed him that Ginn had significantly decreased its proposed cost in its FPR, by more than \$1 million per year. The ATO then consulted the Internet website for Ginn, where he found information showing that Ginn had an ongoing contractual relationship with CACI.

On April 22, the ATO submitted a protest to the Army contracting officer, alleging that the CFM consultant, as a subcontractor to CACI, had unlawfully provided information to Ginn about the MEO during the golf outings, and that this information prompted Ginn to lower its proposed cost. Protest exh. A (ATO Agency-level Protest).

On June 2, the Army rejected the ATO's agency-level protest. Protest exh. B (Decision Denying Agency Protest). On June 12, the ATO filed this protest with our Office.

## DISCUSSION

This protest alleges a violation of the procurement integrity provisions of the Office of Federal Procurement Policy Act, which restrict the disclosure of contractor bid or proposal information while the procurement is underway. 41 U.S.C. § 423(a)-(b) (2006 & Supp. I 2007). However, the procurement integrity provisions also provide thus:

No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of subsection (a), (b), (c), or (d) of this section, nor may the Comptroller General of the United States consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement, no later than 14 days after the person first discovered the possible violation, the information that the person believed constitutes evidence of the offense.

41 U.S.C. § 423(g). In substance, this limitation is also incorporated in both the Federal Acquisition Regulation (FAR) and our Office's Bid Protest Regulations. FAR § 33.102(f); 4 C.F.R. § 21.5(d) (2009).

The Army requests that we dismiss the protest because the ATO did not report his concerns that there had been a violation of procurement integrity within 14 days of learning the underlying facts.<sup>1</sup> Ginn joined the Army's request for dismissal.

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<sup>1</sup> Apart from the timeliness issues, the Army also contends that it has, in fact, properly investigated the allegations, and found them to be unsubstantiated. The investigation included inquiring into any previous dealings between the CFM consultant and the Ginn employee, and obtaining sworn statements from both individuals that no information had been exchanged. The Army also concluded that the reduction in Ginn's costs was fully explained by correcting an error in the formulas used in the electronic spreadsheets of cost information submitted as part of Ginn's proposal. Thus, the Army maintains that this suspected error had been pointed out to Ginn by the Army during discussions, and therefore, even if they had  
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Both the Army and Ginn argue that the ATO should have reported its concerns about a potential violation of procurement integrity within 14 days after being informed, in January, of the golf outings between the CFM consultant and the Ginn employee. In the alternative, they argue that on April 7 counsel for the ATO received the CD-ROM that contained cost information about Ginn. The Army argues that the ATO's protest to the contracting officer, which was the first time that the ATO had alleged a violation of procurement integrity, was filed on April 22, which was more than 14 days after the ATO (through his legal counsel) had received the CD-ROM with Ginn's cost information.

The ATO responds that his report of a procurement integrity violation was timely because he was first advised by his consultants on April 13 that the CD-ROM showed that Ginn had lowered its proposed cost. It was then that the ATO checked the Ginn website, and decided that, in his view, a possible procurement integrity violation had occurred. Accordingly, he argues that his notice to the contracting officer, in the form of an agency-level protest 9 days later, on April 22, was therefore timely.

As required by the statutory language quoted above, we have dismissed allegations of a breach of procurement integrity where a protester failed to present its allegation to the contracting agency within 14 days of discovering the information on which the allegation is based. Honeywell Tech. Solutions, Inc., B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49 at 9 (declining to consider procurement integrity allegation that was not presented to contracting agency within 14 days). The ATO's protest fails for the same reason here. Specifically, the ATO was on notice of the evidence that he used to support his allegation of a breach of procurement integrity, at the latest, when his counsel received the CD-ROM on April 7, which documented the changes in Ginn's proposed costs. Since the ATO's allegation of a procurement integrity violation was first made to the contracting agency on April 22, which is 15 days later, the statute requires that we dismiss the protest. 41 U.S.C. § 423(g).

Receipt of the CD-ROM by the ATO's counsel started the applicable time period for applying the statute's reporting requirement. This conclusion is consistent with our treatment of private-sector protesters in analogous situations. In particular, we have held that receipt of information requiring action by a protester is effective when that information is received by the protester's counsel. Columbia Research Corp., B-247073.4, Sept. 17, 1992, 92-2 CPD ¶ 184 at 4 (timeliness of supplemental protest is based on receipt of information by protester's counsel, not by later receipt of that information by protester); see also SWR, Inc.—Protest & Costs, B-294266.2 et al., Apr. 22, 2005, 2005 CPD ¶ 94 at 7-8 (timeliness is based on receipt of information by counsel to the protester, not by protester itself). In our view, the information that

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been raised timely, the ATO's allegations have no merit. Protest exh. B (Decision Denying Agency Protest), at 6.

the ATO used to support its allegation of a procurement integrity violation was available to the ATO more than 14 days before he notified the agency, and therefore 41 U.S.C. § 423(g) bars our consideration of the protest.

The protest is dismissed.<sup>2</sup>

Daniel I. Gordon  
Acting General Counsel

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<sup>2</sup> On July 9, after receiving a decision denying an agency-level protest, the ATO filed a separate protest against the award, which raises different grounds of protest from those addressed here. We have docketed that protest as B-401482.2, and our Office intends to resolve that protest in a separate decision.