



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Peacock, Myers & Adams

File: B-279327

Date: March 24, 1998

Deborah A. Peacock, Esq., Peacock, Myers & Adams, for the protester.
Joseph A. Lenhard, Esq., Department of Energy, for the agency.
Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed as untimely filed where sent by facsimile transmission, and General Accounting Office time/date stamp and other records indicate protest was received after 5:30 p.m.--the deadline for receipt of protests--on the tenth day of the timeliness period.

DECISION

Peacock, Myers & Adams protests the Department of Energy's (DOE) evaluation of the firm's proposal, and the award of multiple contracts to other offerors, under request for proposals (RFP) No. DE-RP02-97CH10887, for patent preparation and prosecution services.

We dismiss the protest as untimely filed.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier; however, a protest, such as here, challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, must be filed not later than 10 days after the date on which the debriefing is held in order to be timely. 4 C.F.R. § 21.2(a)(2) (1997); Professional Rehabilitation Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2.

The DOE conducted a debriefing with Peacock on February 11, 1998, during which Peacock was apprised of the information underlying its protest grounds. Peacock contends that it then timely filed its protest with our Office on February 23, the tenth day after the debriefing, at approximately 5:28 p.m. Eastern Standard Time (EST) by facsimile (fax) transmission. However, the DOE argues that the protest was untimely, since our records show that the protest was time/date stamped as

received on February 24 at 7:17 a.m., the eleventh day after the debriefing. The DOE further notes that the faxed protest was marked by Peacock's own fax machine with the notation "02/23/98 15:31" on the last (signature) page of the protest; according to the DOE, this indicates receipt of the last page by our Office on February 23 at 3:31 p.m. Mountain Standard Time (MST), or 5:31 p.m. EST. The DOE maintains that because the last page of the protest was received by our Office after our 5:30 p.m. EST closing time, it was properly time/date stamped as received on February 24.

The protester responds that its fax machine time/date mark should not be considered accurate evidence of receipt of the protest because the fax clock was checked on March 4 against the Department of Commerce's Boulder Laboratories atomic time internet site (http://www.bdlrdoc.gov/doc-tour/atomic_clock.html) and found to be approximately 3 minutes fast. Thus, according to the protester, its fax time/date mark "which indicated that the last page [of the protest] was received at 3:31 p.m. should have actually stated 3:28 p.m. [MST]," thus indicating timely receipt before close of business in our Office at 5:30 EST p.m. on February 23. Further, the protester asserts that we should consider evidence of the wristwatch time of contemporaneous witnesses (employees of the protester) who either transmitted the protest or observed the fax transmission, which indicates that the "transmission [was] completed prior to 5:30 p.m. [EST]." In this regard, the protester has submitted three employee affidavits stating that the fax transmission of the protest was completed at "3:27 p.m. [MST]," "minutes prior to 3:30 p.m. [MST]," and "before the half-hour (3:30 p.m.) [MST]."

A protest is considered "filed" on a particular day under our rules when it is received by our Office by 5:30 p.m. EST on that day. 4 C.F.R. § 21.0(g). We require that the entire text of a protest be received prior to this deadline in order for the protest to be timely. See Computer One, Inc.--Recon., B-249352.7, Sept. 27, 1993, 93-2 CPD ¶ 185 at 2-3 n. 1. Generally, to determine when a protest was filed in our Office we rely on our time/date stamp, unless there is other evidence to show actual earlier receipt. Balimoy Mfg. Co., Inc.--Recon., B-250672.2, Mar. 10, 1993, 93-1 CPD ¶ 220 at 4.

There is no viable evidence showing timely receipt. Peacock's assertion that its fax time clock was 3 minutes fast and that transmission was completed minutes before 5:30 p.m. EST on February 23 based on its employees' wristwatch times constitutes evidence within the protester's control. Since such evidence may be developed or altered to support a protester's contentions, we do not consider such evidence sufficient to establish the time of transmission. See Southern CAD/CAM, 71 Comp. Gen. 78, 80 (1991), 91-2 CPD ¶ 453 at 3-4. (Moreover, even if the evidence otherwise were accorded some weight, the time of completion of the fax transmission from the protester's fax machine does not equate with the time of receipt of the protest at our Office, since the fax transmission necessarily took

some time. See Mead Data Cent., 70 Comp. Gen. 371, 373-74 (1991), 91-1 CPD ¶ 330 at 3.)

In the absence of independent corroborating evidence, we must rely on our time/date stamp which, as discussed above, shows receipt of the protest in our Office after 5:30 p.m. on February 23, the tenth day after the debriefing. We also have examined other evidence available, our fax activity report, which confirms that the protest was not timely filed. Specifically, the protest was 12 pages long and the attachments to the protest were 33 pages long.¹ Our fax activity report shows two transmissions from Peacock near the close of business on February 23. The first transmission, starting at 5:06 p.m., was 33 pages long, took 16 minutes 53 seconds to transmit, and has a document number that matches the document number marked by our fax machine on the attachments to the protest. The second transmission, starting at 5:26 p.m., was 12 pages long, took 7 minutes 45 seconds to transmit, and has a document number that matches the document number marked by our fax machine on the protest.² Thus, the fax activity report of this second transmission indicates that the transmission of the protest to our fax machine was not completed until February 23 at 5:33 p.m., that is, after the 5:30 p.m. deadline. We conclude that the protest was not timely received in our Office. See Balimoy Mfg. Co., Inc.--Recon., *supra*, at 4.³

The protester asserts that, because problems were encountered in communicating with our fax machine, any questions as to the timeliness of its protest should be resolved in its favor. However, when a protester opts to file its protest at the last minute by fax, the protester assumes the risk that the protest will not be received at our Office in a timely manner. Danville-Findorff, Inc.--Recon., B-242934.2, Mar. 21, 1991, 91-1 CPD ¶ 313 at 2. A protester's inability to successfully send a fax to our Office shortly before closing does not provide a basis for waiving our timeliness rules. See Computer One, Inc.--Recon., *supra*, at 5. While our timeliness rules may seem harsh in some cases, they reflect the dual requirements of giving all parties a fair opportunity to present their cases and resolving protests expeditiously without

¹Additionally, both had one-page fax cover sheets.

²It is not clear why the fax activity report lists one page fewer than the 13 total pages of the protest transmission, including the fax cover page. However, this discrepancy does not change the fact that the report confirms that the pages accounted for were not all timely received.

³Peacock suggests that its fax cover sheet could be substituted for the last and signature page of the protest in order to determine that the entire protest was filed before the 5:30 p.m. deadline. Such a substitution would not be reasonable, however, in light of the fact that the information contained in the cover sheet is different from the information on the last and signature page of the protest.

disrupting or delaying the procurement process. Mead Data Cent., supra. Application of the timeliness requirement here establishes a readily discernible rule, which results in fair and equal treatment of all protesters.

Peacock asserts that we should consider this case under our significant issue exception to our timeliness requirements. 4 C.F.R. § 21.2(c). However, we will not consider the merits of an untimely protest by invoking the significant issue exception unless the protest raises an issue of first impression or one that would be of widespread interest to the procurement community. The crux of Peacock's protest is its disagreement with the evaluation of its proposal regarding a proximity evaluation factor. This issue, relating to this specific procurement, does not present a significant issue of widespread interest to the procurement community.

The protest is dismissed.

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of the United States