



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Texpar Energy, Inc.

File: B-239973.3; B-240998

Date: October 1, 1990

James J. Gettel, Esq., Minahan & Peterson, for the protester.
Richard Saviet, Esq., Defense Logistics Agency, for the agency.
Linda S. Lebowitz, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests to the General Accounting Office filed more than 10 working days after notice of initial adverse agency action on protester's agency-level protests are untimely.

DECISION

Texpar Energy, Inc. protests the determination of the contracting officer that Texpar was not eligible to receive preferential consideration as a small disadvantaged business (SDB) under request for proposals (RFP) Nos. DLA600-90-R-0161 and DLA600-90-R-0097, issued by the Defense Logistics Agency (DLA) for bulk quantities of JP-4 jet fuel. We dismiss the protests.

The record shows that by letter dated August 2, 1990, the contracting officer advised Texpar that it was not eligible to receive an evaluation preference for SDB concerns because Texpar would not be supplying the product of an SDB manufacturer. By letter dated August 8, Texpar filed agency-level protests challenging the contracting officer's decision. By letter dated August 16, the agency denied Texpar's agency-level protests. The record shows that this denial letter was transmitted via telefacsimile machine to Texpar on August 16 between 11:20 a.m. and 11:22 a.m., as evidenced by the telefacsimile transmission cover sheet and an affidavit from the individual who transmitted the agency's denial letter to Texpar. On August 20, Texpar received in the mail the hard copy of the agency's denial letter. On August 21, Texpar requested information from the

agency regarding the procedures for filing a protest with our Office. The agency responded by letter dated August 23. By letter dated August 29, which was received by our Office on August 31, Texpar filed its protests with our Office.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1990), provide that when a protest is initially filed with a contracting agency, any subsequent protest to our Office must be filed within 10 working days of initial adverse agency action. Discount Mach. & Equip., Inc., B-233541, Feb. 14, 1989, 89-1 CPD ¶ 154. This is defined as any action or inaction that is prejudicial to the position taken in the protest filed with the agency. 4 C.F.R. § 21.0(f). Here, the agency's denial of Texpar's agency-level protests by letter dated August 16 constituted initial adverse agency action, notice of which was sent by the agency via telefacsimile machine to Texpar on August 16. While Texpar alleges it received the hard copy of this letter in the mail on August 20, Texpar, although given the opportunity, has failed to comment on or to rebut the agency's evidence regarding its telefaxed transmission of this letter to Texpar on August 16. There is nothing in the record to indicate that Texpar did not receive this letter on August 16.

Because Texpar was informed on August 16 of the denial of its agency-level protests, it had 10 working days from that date to file any subsequent protests with our Office. Texpar did not file its protests with our Office until August 31, more than 10 working days after notice of initial adverse agency action. Texpar's protests therefore were not timely filed with our Office.^{1/}

Accordingly, the protests are dismissed.

Michael R. Golden

Michael R. Golden
Assistant General Counsel

^{1/} To the extent Texpar argues it did not find out from the agency until August 23 of the procedures for filing a protest with our Office, a protester's lack of actual knowledge of our Bid Protest Regulations is not a defense to dismissal of its protest as untimely because prospective contractors are on constructive notice of our regulations, since they are published in the Federal Register and Code of Federal Regulations. See Pacific Propeller, Inc., B-229868, Dec 30, 1987, 87-2 CPD ¶ 649.