



Comptroller General
of the United States
Washington, D.C. 20548

226195

Decision

Matter of: Adriana Wharton--Reconsideration

File: B-252865.2

Date: May 20, 1993

Kathleen Hamilton, Esq., for the protester.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Request for reconsideration of decision dismissing protest as untimely is denied where the protest was filed at the General Accounting Office more than 10 days after initial decision denying agency-level protest; protester's continued pursuit of protest with the agency does not toll timeliness requirements.

DECISION

Adriana Wharton requests reconsideration of our decision of April 8, 1993, dismissing as untimely her protest of the award of a contract to Lynnette Carson under an invitation for bids issued by the Holy Family Parish, Kadena Air Force Base, Okinawa, Japan, for the provision of services as a religious education coordinator.

We deny the request for reconsideration.

Mrs. Wharton initially sent letters concerning the procurement to the base Inspector General and to the Inspector General, Headquarters Pacific Air Command (IG); these letters were dated December 4 and 7, 1992, and January 3, 1993. By letter to Mrs. Wharton dated February 22, the IG discussed the agency's review of the procurement and stated that the award to Mrs. Carson was proper. On March 22, Mrs. Wharton sent a letter to the Office of the Inspector General at the Pentagon; she received a reply dated April 22.

Mrs. Wharton filed a protest with our Office on March 30. In her protest, Mrs. Wharton argued that the agency improperly opened Mrs. Carson's bid 5 weeks later than it opened the protester's bid, and improperly altered the

statement of work by removing two qualifications prior to award and then reinstating them in the contract.

We dismissed the protest as untimely because our Bid Protest Regulations require that protests based on other than alleged solicitation improprieties shall be filed not 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) (1993).¹ Since Mrs. Wharton stated that she was informed of these bases of protest on December 4, nearly 4 months before filing the protest in our Office, her protest was untimely. Further, Mrs. Wharton now confirms that her December 4 and 7, and January 3 letters were agency-level protests.² Where a protest has been timely filed initially with the contracting agency, a subsequent protest to our Office must be filed within 10 days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21(a)(3). As we stated in our decision, at the very latest, Mrs. Wharton was provided notice of initial adverse agency action in the February 22 letter from the IG. We assume that mail is received within 1 calendar week from the date it was sent, see Signal Corp.--Recon., B-238507.2, Apr. 25, 1990, 90-1 CPD ¶ 424; thus, Mrs. Wharton should have received notice of the agency's adverse action by March 1. Mrs. Wharton's protest to our Office, filed on March 30, was therefore untimely.

In her reconsideration request, Mrs. Wharton states that she pursued her grievance through proper military channels by filing agency-level protests with three different levels of Inspector General responsibility; Mrs. Wharton contends that she should not be penalized for having done so.

We do not agree with Mrs. Wharton's contention that she is being penalized for following the chain-of-command. The fact that Mrs. Wharton continued to pursue her protest with the agency after receipt of the February 22 denial of her protest did not toll our timeliness requirements. See C. Lawrence Constr. Co.--Recon., B-242838.2, Mar. 19, 1991,

¹Mrs. Wharton also protested the agency's decision to issue the solicitation rather than modify her existing contract to reflect a reduction of hours. A protest based on alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1). Here, bid opening was on November 2, 1992; since the protest was not filed until March 30, 1993, this ground of protest was clearly untimely.

²In our decision, we stated that since Mrs. Wharton did not provide us with these letters, we could not determine whether they were in fact agency-level protests.

91-1 CPD ¶ 302. Once informed of an initial adverse agency action, a protester may not delay filing a subsequent protest with our Office while it continues to pursue the protest with the agency. B&E Jackson & Assocs.--Recon., Dec. 7, 1992, 92-2 CPD ¶ 393. It is incumbent upon a contractor to remain diligent in its pursuit of a protest so as not to delay the procurement process any more than absolutely necessary. Bollinger Mach. Shop & Shipyard, Inc.--Recon., B-245702.2, Jan. 16, 1992, 92-1 CPD ¶ 87.

Mrs. Wharton asks us to consider the initial adverse agency action to be the April 22 decision by the Office of the Inspector General at the Pentagon. We decline to do so. Adverse agency action is any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest, 4 C.F.R. § 21.0(f); Mrs. Wharton does not dispute our conclusion that the IG's February 22 letter was a decision on the merits of her protest. While Mrs. Wharton argues that the agency's decision was not final until the Office of the Inspector General at the Pentagon made its decision, our Bid Protest Regulations require a protest such as Mrs. Wharton's to be filed within 10 days of knowledge of initial adverse agency action, not final adverse agency action.

The request for reconsideration is denied.



Robert M. Strong
Associate General Counsel