



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

450205

# Decision

**Matter of:** SDA Inc.  
**File:** B-253355.2  
**Date:** May 20, 1994

## DECISION

SDA Inc. protests the modification of lease contract No. GS-08P-13202, awarded by the General Services Administration (GSA) to Domgaard Associates for office and related space in Ogden, Utah. SDA contends that the modification constitutes a material change to the contract and represents an unjustified sole-source award to Domgaard.

We dismiss the protest as untimely filed.

The contract, which was awarded to Domgaard on August 13, 1993, calls for the lessor to furnish a firm commitment of funds within 30 days of award. Several weeks after the award, Domgaard advised the agency that it was having difficulty obtaining such a commitment because only the first 5 years of the 10-year lease were firm. As a result of the agency's concern that delay would cause disruption and additional expense, the agency negotiated a modification of the contract, which was signed on November 15, 1993. Under the terms of that modification, for which the government received consideration in the form of a rent reduction and a lump-sum credit, the contract was converted into a 10-year firm term lease.

SDA learned of the modification to Domgaard's contract on January 20, 1994, and filed an agency-level protest on January 25. That protest alleged that the modification was an "unjustified sole-source award" which had "no basis in statute, regulation, or contract provision and clearly violates the Competition in Contracting Act (CICA) and its implementing regulations." The agency-level protest requested that GSA terminate the Domgaard contract and resolicit the requirement on a competitive basis. The protest advised that, if GSA's response to the agency-level protest was "adverse," "SDA will consider further protest actions at the General Accounting Office or in the Federal Courts."

GSA denied the agency-level protest on January 31. In its letter denying the protest, the agency set forth, in considerable detail, the factual context of the modification of Domgaard's contract. The letter also noted that "a justification for other than full and open competition was prepared and approved in accordance with the requirements of CICA."

On February 4, shortly after receipt of GSA's letter denying the agency-level protest, SDA submitted a request, pursuant to the Freedom of Information Act (FOIA), seeking a copy of the justification for other than full and open competition upon which the agency relied. SDA received that justification on February 23. The justification, which repeated, with some elaboration, the written explanation provided to SDA in response to the agency-level protest, was apparently written and approved only in February. The agency concedes that it failed to prepare the documentation in a timely manner.

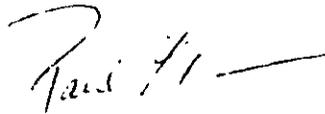
SDA filed its protest with our Office on March 1. SDA contends that the modification of Domgaard's contract was an unjustified sole-source award, and disputes the agency's argument that there were urgent and compelling circumstances justifying the use of noncompetitive procedures. SDA also argues that GSA developed the "urgent and compelling" rationale only after SDA filed its agency-level protest.

GSA contends that SDA's protest should be dismissed as untimely filed. We agree. Our Bid Protest Regulations require that, where a protest is initially filed with the contracting agency, any subsequent protest to our Office, to be timely, must be filed within 10 days of formal notification (or actual or constructive knowledge) of adverse agency action. 4 C.F.R. § 21.2(a)(3) (1994). SDA's agency-level protest explicitly recognized that, if the agency denied the protest, SDA had recourse to our Office. SDA, however, failed to file its protest with our Office within 10 days of receipt of GSA's January 31 denial of the agency-level protest.

SDA responds that it was only when it received a copy of GSA's justification on February 23 that it "obtained its initial knowledge that GSA's sole-source justification was based on alleged urgent and compelling circumstances." SDA's basis of protest, however, was the allegedly improper sole-source contract modification, and SDA was aware of the basis of protest in January--as demonstrated by SDA's raising that issue in its January 25 agency-level protest. See Allied-Signal, Inc.--Recon., B-243555.2, July 3, 1991, 91-2 CPD ¶ 19. The agency's elaboration of its justification (even if, as SDA alleges, the specific

rationale was developed only in response to SDA's agency-level protest) did not provide an independent basis of protest extending the period for filing a timely protest.

The protest is dismissed.



Paul Lieberman  
Assistant General Counsel

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<sup>1</sup>Similarly, the fact that the written justification was approved after the contract modification was implemented does not form an independent basis for protest which would render SDA's protest timely. We note, in this regard, that SDA concedes that justification for use of other than full and open competition may be prepared and approved after contract award when necessary to avoid unreasonable delay. Federal Acquisition Regulation § 6.303-1(e).