Comptroller General
of the United States

Washington, D.C. 20548

91-2 CPD 19
PR

Decision

Matter of: Allied-Signal, Inc.--Reconsideration

File: B-243555.2

Date: July 3, 1991

Karen F. Botterud, Esq., for the protester.
John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Hughes Aircraft Company, the interested party.
Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision dismissing protest of allegedly improper sole-source procurement as untimely is denied; protester's pursuit of its basis of protest with agency's competition advocate did not toll General Accounting Office timeliness requirements where competition advocate's representation that it would recommend competition did not provide protester a reasonable basis to believe that agency was reconsidering its decision to proceed with sole-source acquisition.

DECISION

Allied-Signal, Inc. requests reconsideration of our decision, Allied-Signal, Inc., B-243555, May 14, 1991, 91-1 CPD ¶ 468, in which we dismissed as untimely its protest of the modification of contract No. F33657-89-C-2133, awarded by the Department of the Air Force to Hughes Aircraft Company for systems integration of Maverick and Hellfire missiles, to include development of test equipment for Hellfire missiles. Allied-Signal alleged that the proposed modification was outside the scope of Hughes' original contract, and thus constituted an improper sole-source award to Hughes.

We deny the request.

The protest record indicated that on November 7, 1990, Allied-Signal submitted to Hughes a subcontractor proposal for the work contemplated under the proposed modification to Hughes' contract. On or about February 18, 1991, Hughes informed Allied-Signal that it would be performing the work itself. Allied-Signal then contacted the Air Force on February 22 and

stated that it was considering protesting the modification. On March 1, Allied-Signal's representatives met with the Air Force's competition advocate to complain about the proposed modification. The competition advocate stated that he would recommend that a competition be conducted, but ultimately informed Allied-Signal on March 22 that the Air Force would proceed with the modification. Allied filed its protest on April 5, 10 working days after March 22.

As the record indicated that Allied-Signal knew of the Air Force's intent to modify Hughes' contract more than 5 months before the protest was filed, we held that the protest was untimely under our Bid Protest Regulations, which provide that protests not based upon alleged defects in a solicitation must be filed not later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1991). We also noted that Allied-Signal's attempt to persuade the agency to change its position through its competition advocate did not toll our timeliness requirements. See American Productivity & Quality Center, B-242703, Jan. 18, 1991, 91-1 CPD ¶ 60.

In its reconsideration request, Allied-Signal asserts that our decision erroneously assumed that its basis of protest arose in late 1990, when the Air Force decided to modify Hughes' contract. Allied-Signal alleges that this assumption failed to take into account "the competition advocate's recognition that the proposed modification was improper and remedy of that impropriety by halting the existing sole-source procurement through the requirement of a competition." Allied-Signal concludes that the competition advocate's decision essentially rendered its original complaint moot, and that a new basis of protest arose when the competition advocate informed Allied-Signal that the agency planned to proceed with the contract modification.

This argument is without merit. While the competition advocate appears to have agreed initially with Allied-Signal that the modification to Hughes' contract was improper, there is no indication that he represented to Allied-Signal that the agency (presumably the contracting officer) had reversed its position regarding the propriety of the modification. The record contains a March 14 letter from Allied-Signal to the competition advocate memorializing a March 13 telephone conversation in which the competition advocate apparently expressed agreement with Allied-Signal's view regarding competition of the requirement. The letter concluded, "we await your final decision," indicating Allied-Signal's understanding that the agency had not reversed its position up to that point. In fact, the contracting activity then successfully convinced the competition advocate that a sole-source procurement was justified, and the competition advocate

approved the sole-source document on April 4. Thus, while the competition advocate agreed to take up the matter of competition with the activity, we find nothing in the competition advocate's representations that reasonably should have indicated to Allied-Signal that the Air Force no longer intended to proceed with the modification; the mere fact that the competition advocate agreed with the protester and interceded on its behalf did not warrant an assumption that the agency had changed its position. See generally General Hone Corp., B-242357.2, Mar. 22, 1991, 91-1 CPD ¶ 322 (agency's continuing discussion with protester does not toll timeliness requirements once agency clearly has taken position that constitutes adverse agency action). Consequently, we reiterate our conclusion that Allied-Signal was required to file its protest within 10 working days after learning of the agency's intent in 1990.

Allied-Signal cites our decision in Liebert Corp., B-232234.5, Apr. 29, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 413, in support of its position. The facts of Liebert, however, were materially different from those here. In that case, which involved an agency's decision to purchase items under another firm's requirements contract, the competition advocate assured Liebert that the agency had changed its plans and would not be purchasing the items under the requirements contract; we held that Liebert reasonably believed that the agency had addressed its concerns, and that it had no reason to protest until the agency later announced that it had changed its plans again and would order the items under the requirements contract. Here, in contrast, as we concluded above, Allied-Signal was never informed that the agency had changed its plans and had no reasonable basis for assuming such a change had taken place.

We also note that the protester in Liebert diligently pursued its basis of protest by seeking information about the agency's plans under the Freedom of Information Act as soon as it learned of them, and pursued the matter with the agency's competition advocate immediately upon learning that it would not be receiving any additional information. Here, despite Allied-Signal's knowledge of the Air Force's plans to modify Hughes' contract no later than November 1990, the firm raised no objection until February 1991, after its negotiations with Hughes did not result in a satisfactory arrangement. Allied-Signal's 3-month delay in raising with the competition advocate its objections to the modification constitutes a failure to diligently pursue the matter, and also renders its

subsequent protest untimely. See J&J Maintenance, Inc., B-223355.2, Aug. 24, 1987, 87-2 CPD ¶ 197.1/

Allied-Signal alleges that, even if the remainder of its protest is untimely, the issue of the adequacy of the agency's justification and approval (J&A) for proceeding with the modification was an independent ground of protest that it timely raised on April 30, 8 working days after Allied-Signal received a copy of the document on April 18. We do not agree. The issue of Allied-Signal's untimely protest was the propriety of the agency's planned modification to Hughes' contract or, put another way, whether the agency had legal justification for its approach. The J&A document merely set forth the legal justification for the agency's decision to execute the modification. A challenge to the propriety of the modification thus is no different than a challenge to the justification set forth in the J&A. Therefore, Allied-Signal's protest of the legal sufficiency of the J&A, being a restatement of the untimely protest ground, also is untimely and will not be considered.

Finally, Allied-Signal asserts that the competition advocate's recommendation to the contracting activity that a competition be conducted amounts to an admission that the proposed modification was improper, and argues that it is the policy of our Office not to dismiss a protest as untimely where the procuring agency admitted some wrongdoing. This argument is without merit. The agency's execution of the J&A--with the competition advocate's approval--evidences its view that the modification was proper, notwithstanding the competition advocate's initial disagreement with that view.

We conclude that Allied-Signal has not established that our decision was based on any error of fact or law, or presented new information warranting reversal or modification of our

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1/ Allied-Signal contends it could not have challenged the proposed modification of Hughes' contract 5 months earlier because if it had attempted to do so, our Office would have dismissed the protest as academic when the competition advocate recommended a competitive procurement. Allied-Signal is incorrect. Its protest would have become academic only if the Air Force adopted any recommendation by the competition advocate, something the Air Force never did.

decision. Therefore, the request for reconsideration is denied. 4 C.F.R. § 21.12; B.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Ronald Berger
Associate General Counsel