**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: L. Washington & Associates, Inc.--Reconsideration

File: B-274749.2

Date: November 18, 1996

Brian M. Fleischer, Esq., Fleischer & Fleischer, for the protester.
Seth Binstock, Esq., Social Security Administration, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against elimination of proposal from the competitive range was properly dismissed as untimely where the protest was filed more than 10 days after the protester was orally notified that its proposal was eliminated; a protester cannot wait until it receives written confirmation of oral notification that its proposal has been eliminated to file its protest.

DECISION

L. Washington & Associates, Inc. (LWA) requests reconsideration of our October 6, 1996, dismissal of its protest alleging that the Social Security Administration (SSA) improperly eliminated its proposal from the competitive range under request for proposals (RFP) No. 96-2548 for security guard services. We dismissed the protest as untimely because it was filed more than 1 month after the protester knew that its proposal had been eliminated.

We affirm the dismissal.

In dismissing LWA's protest, we noted that the contracting officer had notified LWA (by letter dated August 14, 1996) that its proposal was not included in the competitive range and informed LWA of the specific reasons why the proposal was rejected. We also noted that, after LWA wrote to the contracting officer to refute the agency's determination that its technically unacceptable proposal should be rejected and furnished additional related information, the contracting officer told LWA (during an August 21 telephone call) that its proposal was still considered unacceptable. Because LWA knew upon receipt of the contracting officer's August 14 letter that its proposal was eliminated from the competitive range as well as the specific reasons for the agency's decision to reject its proposal, and because LWA knew from the contracting officer's August 21 telephone call that the agency still considered its proposal to be technically unacceptable and not in the

competitive range, we dismissed LWA's September 24 protest to our Office as untimely under section 21.2(a)(2) of our Bid Protest Regulations which requires that a protest be filed not later than 10 days after the protester knows its basis for protest. Bid Protest Regulations, § 21.2(a)(2), 61 Fed Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)).

In its reconsideration request, LWA contends that it did not actually know its basis for protest until it received a letter, dated September 23, 1996, from the contracting officer notifying it that the contract had been awarded to another firm and, therefore, that LWA's proposal would no longer be considered for contract award. LWA states that after it received the August 14 letter which first notified it that its proposal was eliminated from the competitive range, LWA wrote to the contracting officer on August 16 and refuted the agency's determination that its proposal was deficient and would need a "major rewrite" before it could be considered acceptable. LWA also alleges that it had several conversations with the contracting officer who admitted that the agency had improperly evaluated LWA's proposal and told LWA that the proposal would be reevaluated upon LWA's submission of additional information. Thus, LWA contends that it submitted additional information and believed that its proposal was being considered for award until it received the contracting officer's September 23 letter.

The contemporaneous record of pertinent events does not support the protester's assertion that it did not know its basis for protest--i.e., that its proposal had been eliminated from the competitive range--until it received the contracting officer's September 23 letter. The contemporaneous record reveals the following chronology. The agency initially rejected LWA's proposal and notified LWA by letter of August 14 that it was no longer being considered for award. Upon receipt of LWA's letter of August 16 and additional information concerning LWA's references, the agency reevaluated LWA's proposal and again determined that it was not in the competitive range. In a telephone conversation on August 21, the contracting officer advised LWA's president that, after reevaluation of its proposal, the contracting officer had again concluded that the proposal did not have a reasonable chance of award and, therefore, was not considered in the competitive range; this oral notification is confirmed by the contracting officer's contemporaneous handwritten record of the telephone call. The fact that the contracting officer told LWA that its proposal was still considered unacceptable after reevaluation was also confirmed in an August 22 letter from the protester's attorney to the contracting officer in which protester's attorney indicated that LWA had submitted additional information (after it was requested on August 19) and stated:

> "Very shortly thereafter, in a matter of hours, you notified LWA that their proposal was unacceptable. Apparently, LWA's proposal was disregarded without the proper analysis and consideration . . . ."

Thus, while LWA now argues that it thought the contracting agency was still considering its proposal based upon the additional information LWA had submitted, the contemporaneous record of the pertinent events does not support LWA's argument. Furthermore, the contemporaneous record includes a conference and call record, written by the contracting officer on August 26, which shows that the contracting officer and the evaluation team leader telephoned the protester's counsel on August 23 and explained in great detail how SSA had reevaluated LWA's proposal after receiving additional information from the firm and again concluded that the proposal was unacceptable stating:

> "However, the re-scoring did not give [LWA] enough points to compete with the other good offerors we had; in other words, [LWA] still did not have a reasonable chance for award."

Thus, both LWA's president and its attorney knew that LWA's proposal was no longer being considered for award (via the August 21 and 23 telephone calls, respectively), and LWA was required to file a protest with our Office no later than 10 days after the earlier notification (i.e., the August 21 telephone call). Bid Protest Regulations, § 21.2(a)(2), supra. Instead, LWA waited more than 1 month--after it received the contracting officer's September 23 letter notifying it that the contract should be awarded to AREAWIDE Services Limited--to file its protest with our Office. However, since LWA already knew its proposal had been rejected, LWA could not wait until it received formal, written notification of award to another offeror. See Phoenix Prods., Inc., B-248790; B-248791, Aug. 17, 1992, 92-2 CPD ¶ 111; GBF Medical Group/Safety Prod. Mktg., Inc.--Recon., B-250923.2, Nov. 24, 1992, 92-2 CPD ¶ 378. Moreover, once the contracting officer notified LWA that its proposal was rejected, the fact that LWA and its attorney subsequently tried to convince the agency to include its proposal in the competitive range and that the agency may have accommodated the protester by discussing the matter did not toll the timeliness requirement of our Bid Protest Regulations. See, e.g., International Enters., Inc., B-251403, Apr. 1, 1993, 93-1 CPD ¶ 283; Allied-Signal, Inc., B-243555, May 14, 1991, 91-1 CPD ¶ 468.

Alternatively, LWA contends that its August 16 letter to the contracting officer should be considered an agency-level protest, and that since the contracting officer did not respond to the agency-level protest, the agency's September 23 letter notifying LWA that its proposal would no longer be considered for contract award was the initial adverse action on its agency-level protest. However, our examination of its August 16 letter to the contracting officer reveals that the letter clearly was not intended to be a protest, and, in fact, the letter plainly stated that it was intended to refute the agency decision to reject LWA's proposal and that it was not an agency-level protest. Thus, the letter did not serve to toll our timeliness requirement. See Aero Components Co. of Arlington, Inc., B-244100, June 20, 1991, 91-1 CPD ¶ 586. In any event, even if we did consider LWA's letter to be a protest

to the contracting agency, the contracting officer's telling LWA's president on August 21 that the agency had reevaluated LWA's proposal and again rejected it would have been the initial adverse agency action on the protest, and LWA would have had to file its protest in our Office within 10 days to be timely. As LWA did not file its protest in our Office until September 24, the protest would be untimely even under this scenario. Bid Protest Regulations, § 21.2(a)(3), 61 Fed Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(3)).

The dismissal is affirmed.

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