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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209225

DATE: November 22, 1982

MATTER OF: Fonar Corporation

DIGEST:

Protest filed with GAO more than 10 working days after protester learns of initial adverse agency action (decision to proceed with sole-source procurement despite protester's interest in submitting competitive proposal) on protest to agency is dismissed as untimely.

Fonar Corporation (Fonar) protests the Department of Health and Human Services (HHS), National Institutes of Health, decision to procure a nuclear magnetic resonance (NMR) imaging system on a sole-source basis. The protest is untimely.

Under our Bid Protest Procedures, a protester has 10 working days after initial adverse agency action on its protest filed with the contracting agency to file a protest with our Office. 4 C.F.R. § 21.2(a) (1982). Adverse agency action is defined as any action or inaction which is prejudicial to the position taken in a protest filed with an agency. 4 C.F.R. § 21.0(b) (1982).

Fonar became aware of HHS's proposed procurement of an NMR imaging system in mid-January 1982. At that time Fonar contacted HHS and requested that it be included in the procurement. On June 10, 1982, Fonar read in the Commerce Business Daily that HHS intended to make a sole-source award for the requirement. Fonar immediately phoned HHS "requesting clarification." We view this phone call as tantamount to a protest of the sole-source procurement to HHS. Fonar and HHS met on June 24, 1982, and Fonar reports that it:

"* * * was informed that an administrative review process was in progress and that final action

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as to whether * * * [HHS] would proceed sole source * * * or request other proposals would be determined during that review process and that at any time during the review process * * * [HHS] could decide to proceed by proposals from other companies."

However, on June 25, 1982, HHS phoned Fonar and advised that it "was proceeding with its present approach of going sole source." A contemporaneous document, on Fonar letterhead and signed by the Assistant to the President, shows that Fonar's reaction to the phone call was that "the assumption must be that they are proceeding with their award."

Although Fonar now contends that following HHS's phone call it "was left with the definite impression that other action was necessary * * * before a definitive position would be taken from which a protest might lie," we believe that the June 25, 1982, phone call was clearly adverse to Fonar's position and that Fonar understood it as such. See Interior Steel Equipment Co., B-208525, October 1, 1982, 82-2 CPD ____. We note that Fonar wrote its Congressman, seeking assistance in opening the procurement to competition, on the same day. We received Fonar's subsequent protest on September 24, 1982, well beyond the 10-day limit of 4 C.F.R. § 21.2(a). Therefore, the protest is untimely and will not be considered.

The protest is dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel