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DECISION



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

FILE: B-214409.3

DATE: December 3, 1984

MATTER OF: Comdisco, Inc.--Reconsideration

DIGEST:

GAO will not modify decision declining to recommend corrective action regarding the improper award of a lease for automatic data processing equipment where protester delayed filing protest until more than 4 months after award--the untimely protest was considered pursuant to the "significant-issue" exception to GAO's timeliness rules--and a substantial period of the lease has been performed.

Comdisco, Inc. requests that we modify our decision sustaining its protest against the Department of the Army's issuance of a delivery order to International Business Machines Corporation (IBM) for the lease, installation, maintenance and technical support of certain automatic data processing (ADP) equipment at Fort Polk, Louisiana. Comdisco, Inc., B-214409.2, Oct. 18, 1984, 64 Comp. Gen. _____, 84-2 CPD ¶ _____. The protester's request is that we recommend corrective action, something we declined to do because the protester had failed to file its protest in a timely manner (we had considered the protest under the significant-issue exception to our timeliness rules, 4 C.F.R. § 21.2(c) (1984)) and because we understood that a termination of the lease would subject the government to significant termination costs under IBM's contract. We decline to modify our decision.

Comdisco now attempts to demonstrate extenuating circumstances for the untimely filing of the protest, and to suggest that a recompetition would result in an actual savings to the government even if IBM were to receive termination costs. Comdisco therefore urges us to recommend that the Army terminate IBM's contract for the government's convenience and recompetete its requirement.

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We have stated that the determination whether an improperly awarded contract should be terminated involves the consideration of several factors, including 1) the seriousness of the procurement deficiency, 2) the degree of prejudice to other offerors or the integrity of the competitive procurement process, 3) the good faith of the parties, 4) the extent of performance, and 5) the impact of a termination on the procuring agency's mission. See DSI Computer Services, Inc., B-207423, Aug. 24, 1982, 82-2 CPD ¶ 173.

In this case, Comdisco--despite being aware of the Army's method of evaluation--did not file a protest with this Office until more than 4 months after learning of the award to IBM. Comdisco explains that it had considered filing a protest or seeking injunctive relief from the courts, but decided against doing either one since the advice of counsel indicated a low probability of success. As a result of Comdisco's delayed filing, this Office did not issue a decision until a substantial period of performance had elapsed in an anticipated performance period of approximately 2 years.

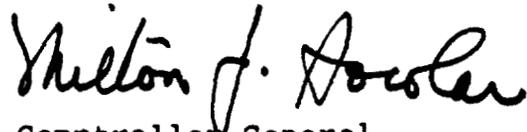
The purpose for our timeliness rules is to insure that protests are filed at a point in the procurement when corrective action, if warranted, is most practicable. See Dynamics Research Corp., B-213273, Dec. 28, 1983, 84-1 CPD ¶ 33. While we do not believe that Comdisco acted other than in good faith in delaying filing a protest, we believe that the firm's failure to timely and diligently pursue its protest militates against our disrupting the contracting agency's mission with a recommendation that IBM's contract be terminated and a competition conducted for the short term remaining.

Regarding termination costs, Comdisco argues that any termination costs for the lease of marketable, off-the-shelf items, as here, would be insignificant, and would be offset by the savings available through a recompetition. This argument, however, is entirely speculative and, for the considerations discussed above, is insufficient to recommend termination at the advanced stage that would not have been reached had Comdisco protested in a timely manner.

Finally, we point out that in our prior decision we did note that we were recommending that the Secretary of the Army take appropriate action to prevent a recurrence of the cited deficiencies in future procurements.

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We therefore decline to modify our decision.

for 
Comptroller General
of the United States