

DECISION

2/607
18-1/82

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

118246

FILE: B-204960.3

DATE: April 26, 1982

MATTER OF: HCS, Inc.--Reconsideration

DIGEST:

GAO affirms prior decision because the protester has not shown any errors of law or fact in the decision's holding that the protest was untimely filed under 4 C.F.R. § 21.2(a) (1981), since the protester's appeal of the initial adverse agency action to the Secretary of Health and Human Services did not extend the time to file a subsequent protest with GAO.

HCS, Inc., requests reconsideration of our decision in the matter of HCS, Inc., B-204960.2, March 23, 1982, 82-1 CPD _____, which dismissed, as untimely, HCS's protest against the award of a contract to Systems Management Associates, Inc., under request for proposals (RFP) No. 271-81-4922 issued by the National Institute on Drug Abuse, Department of Health and Human Services (HHS), for the operation of the National Drug Abuse Center.

HCS contends that our decision fails to consider an HHS regulation, which permitted HCS to appeal the initial adverse agency action to the Secretary of HHS prior to protesting here. After considering HCS's contention, we affirm the prior decision.

The relevant facts are not disputed. By letter dated October 23, 1981, HCS protested to the procuring activity, contending that six specific violations of applicable procurement regulations and procedures rendered the award illegal. By letter dated November 18, 1981, the procuring activity denied the protest, responding point-by-point to the objections by HCS. By letter dated December 1, 1981, HCS appealed

the initial adverse agency action to the Secretary of HHS. By letter dated February 9, 1982, received by HCS on March 3, 1982, the Secretary affirmed the denial of HCS's protest by the procuring activity.

By letter dated March 12, 1982, received here on the same date, HCS protested to our Office, raising essentially the same objections that were contained in its initial protest dated October 23, 1981.

In the decision, we stated that under our Bid Protest Procedures, if a protest is filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of formal notification of initial adverse agency action, 4 C.F.R. § 21.2(a) (1981). Further, we stated, citing BKC Incorporated, et al., B-198905, June 10, 1981, 81-1 CPD 474, and decisions cited therein, that a protester's continued pursuit of its protest with the contracting agency, despite the initial rejection of its protest, does not extend the time or obviate the necessity for filing a protest with our Office within 10 working days of initial adverse agency action.

Accordingly, we held that since HCS's protest to our Office was not filed here within 10 working days after it received notice of the initial denial of its protest, HCS's protest was untimely and its various requests for relief would not be considered on the merits.

On reconsideration, HCS refers to an HHS regulation, 41 C.F.R. § 3-2.407-8 (1981), which provides as follows:

"If a protest has been filed initially with the contracting officer, any subsequent protest to the Secretary, Department of Health & Human Services or the General Accounting Office filed within ten (10) Federal Government working days of notification of adverse action will be considered provided the initial protest to the contracting officer was timely."

HCS first contends that "adverse action" for purposes of protest to GAO is the final adverse action of the agency. In HCS's view, to maintain otherwise would render an appeal

to the Secretary of HHS a meaningless exercise. HCS states that it is inapposite to the purposes and policies behind GAO's bid protest function to create a system where, within 10 days after the offeror is first aware that the Government disagrees with the protest, the offeror must choose whether to appeal to a final decision from the Secretary of the agency, to apply to GAO for relief, or to maintain duplicate appeals in both forums.

Second, HCS contends that the HHS regulation is in conflict with GAO's Bid Protest Procedures, 4 C.F.R. part 21 (1981), with the result that the conflict must be construed against the Government, thus permitting our Office to consider HCS's protest.

Third, HCS argues that the BKC Incorporated, et al., decision is not controlling because that matter involved the Defense Acquisition Regulation (DAR), which provides that protests are to be conducted according to GAO's regulations.

In our view, HCS has presented no legal argument which would warrant modification or reversal of the prior decision. First, the adverse action clearly contemplated by both the HHS regulation and our Bid Protest Procedures (4 C.F.R. § 20(a) (1981)) is the initial adverse agency action, not the final adverse agency action. In 52 Comp. Gen. 20 (1972), we noted that the intent of our procedure is to secure the expeditious resolution of the matter, if possible when some meaningful relief may be afforded, not many months after the contract has been awarded--as in the HCS situation. In that decision, we recognized that a protester may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protester to engage in further correspondence with the agency and it may be difficult to identify the final adverse agency action. For that reason, we regard it as obligatory upon a protester to file its protest here within the stated number of days of notification of initial adverse agency action, in order to be considered timely.

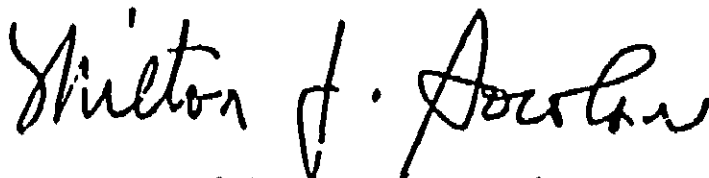
We have consistently held that continued pursuit of a protest with the agency after initial adverse action does not toll the time for protesting here.

See, e.g., Rowe Industries, B-185520, January 8, 1976, 76-1 CPD 13; Control Data Corporation, B-193487, December 12, 1978, 78-2 CPD 408; Domar Buckle Mfg. Corp., B-202901, May 21, 1981, 81-1 CPD 401.

Second, we find no conflict between the HHS regulation and our Bid Protest Procedures. After initial adverse action by an HHS contracting officer, under the HHS regulation, a protester has an election of remedies, the Secretary of HHS or GAO, and the protester has the option of electing both forums simultaneously. However, neither the HHS regulation nor the Bid Protest Procedures authorize a protester to wait for a final Secretarial determination on its appeal of the initial adverse agency action before protesting to our Office.

Third, in our view, the fact that the BKC Incorporated, et al., decision was a procurement under the DAR is not a significant difference between the matter involved in that decision and the instant matter. In both situations, the protesters elected to pursue the initial adverse agency action at higher levels in the agency and, while doing so, the time to file a timely protest with GAO expired. Thus, HCS's protest was untimely filed under our Bid Protest Procedures.

Accordingly, the March 23, 1982, decision is affirmed.

for 
Comptroller General
of the United States