

DOCUMENT RESUME

06967 - [B2227285]

[Untimely Protest Filed with GAO after Denial by Agency].
B-192071. August 9, 1978. 5 pp.

Decision re: San Pedro Tugboat Co.; by Milton Socolar (for Paul G. Deubling, General Counsel).

Contact: Office of the General Counsel; Procurement Law I.
Organization Concerned: Department of the Navy; Naval Regional
Procurement Office, Long Beach, CA; Pacific Tugboat and
Salvage Co.

Authority: 4 C.F.R. 20. 52 Comp. Gen. 20. 52 Comp. Gen. 23.
B-190445 (1978). B-184265 (1975).

A company protested the denial of its protest against a contract award by the agency and tried to establish its timeliness. The protest was dismissed because: it was untimely filed with GAO more than 10 days after the agency denial; an allegation concerning the contractor's performance was a matter of contract administration and not reviewable by GAO; the protester's independent analysis of agency denial was not a basis for extending the 10-day limitation; and the protest did not raise significant issues which would exempt it from timeliness requirements. (HTW)

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DECISION



*M. Archibald
Proc. I*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-192071

DATE: August 9, 1978

MATTER OF San Pedro Tugboat Co.

DIGEST:

1. Protest not filed with GAC within 10 days of agency denial of protest is untimely and will not be considered on merits.
2. Allegation concerning contractor's nonconforming performance of contract, which agency disputes, is matter of contract administration not for GAC consideration.
3. Even assuming protester filed timely protest with agency, protester's independent analysis of agency denial is not good-cause basis for extending 10-day limitation for filing with GAO.
4. Protest based upon bid responsiveness/bidder responsibility and contract performance of particular contractor does not raise issues significant to procurement practices or procedures and is not exempted from time-for-filing requirements.

On June 1, 1978, San Pedro Tugboat Co. (San Pedro) protested to our Office the denial of its March 3, 1978, protest to the contracting agency against the award of a contract under solicitation No. NOO123-78-R-0381. San Pedro alleges that the successful bidder for this contract (Pacific Towboat and Salvage Company) was nonresponsive to the requirements of the solicitation and that its performance under the contract has not conformed to the terms thereof.

On June 16, 1978, we received a letter from San Pedro's attorney anticipating a finding that the protest was untimely filed and attempting to establish its timeliness.

The record shows that the contract in question is to provide tug services for military vessels in the Long Beach-San Pedro Harbor during the period of February 1, 1978, through November 30, 1978. The record also shows that there was a short turn-around time between the award date and the beginning of the contract period on February 1, 1978. San Pedro, however, did not protest the award to the Naval Regional Procurement Office at Long Beach, California, until March 3, 1978.

San Pedro stated, both in its protest to the agency and our Office, five major bases of protest:

- (1) Pacific did not at commencement of the contract and presently does not have readily available the minimum quantity of required horsepower tugboats;
- (2) Pacific has failed to meet the 1-hour response standard specified by the Navy during a preaward solicitation meeting;
- (3) Pacific did not possess the required radio communication facilities at the commencement of the contract term;
- (4) Pacific failed at commencement of the contract and still fails to provide the fender systems required for contract performance; and
- (5) Pacific compares unfavorably with San Pedro in meeting the E.S.O. obligations of a Government contractor.

In its response to San Pedro, the Department of the Navy noted the untimeliness of San Pedro's protest. However, certain questions raised by San Pedro were found of sufficient interest to merit investigation. After investigation of the allegations concerning the number of available tugs, the radios and the fendering systems, the Navy denied San Pedro's protest by letter of April 10, 1978.

We note that the Navy did not specifically respond to two of San Pedro's allegations. First, the charge that Pacific had been late in responding to Navy requests for tug service is mentioned by implication only in the Navy's statement that questions addressed to the contractor's performance are "inappropriate." Nonconforming performance is clearly a matter of contract administration for consideration by the Navy and not our Office. Vintage Services, Inc., B-190445, January 11, 1978, 78-1 CPD 25.

Second, in its denial the Navy does not mention San Pedro's charge that Pacific might not be in compliance with present equal employment opportunity laws. However, in its protest to GAO, San Pedro appears to have abandoned this allegation. San Pedro now suggests merely that Pacific's most recent affirmative action plan compares unfavorably with San Pedro's current plan. It is our view, therefore, that San Pedro has failed to state an actual basis of protest in this regard. Therefore, the claim that Pacific's affirmative action plan compares unfavorably with San Pedro's will not receive further consideration.

With regard to the remaining bases of protest, while San Pedro characterizes them as relating to bid responsiveness, it appears that they are properly related to Pacific's responsibility, i.e., its capability to perform the required services in accordance with the terms of the contract. Since our Office does not normally review affirmative determinations of responsibility, the protest would be for dismissal. However, because of our conclusions below concerning timeliness, it is not necessary to decide whether the bases of protest relate to responsiveness or responsibility.

As to the timeliness issue, San Pedro failed to protest the adverse agency action of April 10, 1978, to our Office until June 1, 1978. Section 20.2(a) of our Bid Protest Procedures (4 C.F.R. § 20.2(a) (1977)) provides in pertinent part that:

"If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the

agency was filed in accordance with the time limits prescribed in paragraph (b) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control."

Paragraph (b) of section 20.2 (4 C.F.R. § 20.2(b)(2)) provides that:

"* * * bid protests shall be filed not later than 10 days after the basis for the protest is known or should have been known, whichever is earlier."

The record is not completely clear as to the Navy's basis for saying the protest to it was untimely. Nevertheless, since San Pedro clearly did not comply with the 10-day time-for-filing requirement to the GAO after denial of its protest by the Navy, the protest is untimely and will not be considered on the merits.

In the letter received on June 16, 1978, San Pedro's attorney argues that San Pedro's protest should be exempted from the timeliness requirements under section 20.2(c) of our Bid Protest Procedures (4 C.F.R. § 20.2(c) (1977)) which states:

"The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely."

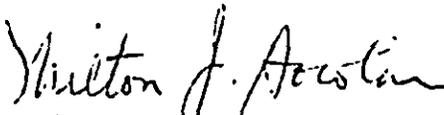
It is stated that San Pedro required time to analyze the Navy's denial in order to learn of the "entire" basis of its protest and that the time required for this analysis was a good-cause delay. Further, it is stated that San Pedro's protest raises issues significant to procurement practices and procedures.

Even assuming San Pedro had timely filed with the Navy, the time taken to conduct an independent analysis of the agency's denial prior to filing with our Office

is not a valid basis for extending the 10-day limitation. R. G. Robbins & Company, Inc., B-184265, July 18, 1975, 75-2 Comp. 51. San Pedro had knowledge of the bases of its protest when it filed with the Navy. The argument that the "entire" bases of protest were not known until San Pedro filed with GAO over 1 month after the Navy's denial is not therefore considered a good-cause delay.

The Comptroller General has defined "issues significant to procurement practices and procedures" as those which refer "not to the sum of money involved, but to the presence of a principle of widespread interest." 52 Comp. Gen. 20, 23 (1972). San Pedro's protest, which is essentially concerned with bid responsiveness/bidder responsibility and contract performance of a particular contractor, does not come within the meaning of this provision.

Accordingly, the protest is dismissed.

for 
Paul C. Dembling
General Counsel