

DECISION

18YS-1 PL

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

[Untimely Protest of Air Force Contract Award]

FILE:

B-199349

DATE: November 18, 1980

MATTER OF:

Towson Industrial Maintenance
Corp.--Reconsideration

DIGEST:

Prior decision dismissing portion of protest as untimely is affirmed on reconsideration since protester has not shown that decision was based on errors of fact or law.

Towson Industrial Maintenance Corp. (TIMCO) has requested reconsideration of a portion of our decision dismissing in part and denying in part its protest against award of a contract by the United States Air Force to Ravenswood Industries, Inc. (Ravenswood), under invitation for bids No. F04606-80-B-0001. Towson Industrial Maintenance Corp., B-199349, October 7, 1980, 80-2 CPD ____.

TIMCO contends we erred in holding untimely TIMCO's allegation that the contracting officer's determination that Ravenswood was responsible was made in bad faith and was "tantamount to fraud." TIMCO admits that it received the document which revealed this basis for protest on August 29, 1980, that the issue was first raised orally at a conference at the General Accounting Office (GAO) on September 5, 1980, and that the issue was not raised at GAO in writing until September 18, 1980. As stated in our prior decision, the GAO attorney presiding over that conference explained to all conferees that, while a discussion on Ravenswood's responsibility could be held, the issue was not formally protested unless and until TIMCO submitted the issue in writing. Furthermore, the GAO attorney stated that the Air Force would not be expected to report on this new issue until a written statement of the new ground for protest was submitted. TIMCO requested and was granted until September 19 to file written comments on the conference and all conferees were cautioned that our decision would be based solely upon the written record and not on oral arguments raised

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at the conference. Moreover, the GAO attorney advised TIMCO that the new issue would have to independently satisfy our timeliness requirements based upon the filing of this issue in writing. Counsel for TIMCO stated that he would file this new issue with his comments on the conference. The GAO attorney advised counsel for TIMCO that since this issue would not be considered until it was filed in writing and in view of our timeliness requirements, counsel for TIMCO should file it as soon as possible rather than waiting to submit this new issue with TIMCO's comments.

TIMCO, however, did not file the allegation concerning Ravenswood's responsibility until September 18 when the new issue was incorporated into TIMCO's comments on the conference. Since more than 10 working days had elapsed between TIMCO's knowledge of the basis for protest and its filing of this issue, we held this issue to be untimely. Because of the serious nature of the charges, we examined the arguments presented by TIMCO and determined that there was no evidence of fraud or bad faith on the part of the contracting officer or other agency officials.

TIMCO now argues that the responsibility issue was timely because this issue was raised orally at the conference within the 10-day requirement and the GAO attorney agreed that the issue did not have to be submitted in writing until the time permitted to comment on the conference. The GAO attorney denies that he agreed to permit a delay in filing the written protest. To the contrary, the recollection of the attorney and his memoranda prepared at and shortly after the conference confirm the above-stated advice to TIMCO's counsel. In addition, the GAO attorney could not have waived the timeliness requirements, and all interested parties were furnished with copies of our Bid Protest Procedures (4 C.F.R. part 20 (1980)) which delineate clearly our timeliness rules, and any party which deviates from these procedures does so at its own risk. Cf. Arawak Consulting Corporation--Request for Reconsideration, B-196010.2, September 5, 1980, 80-2 CPD 178, wherein we considered an untimely issue because the GAO attorney might have unintentionally misled the protester into an untimely filing by granting

an extension for filing comments and the GAO attorney had not directed the protester's attention to the timeliness requirements. That case, of course, is distinguishable from the present situation since here the GAO attorney's clear recollection and contemporaneous memoranda indicate that TIMCO's counsel was advised of the filing requirement.

TIMCO also takes issue with our statement that, despite our finding that the allegations concerning the contracting officer's affirmative determination of Ravenswood's responsibility were untimely filed, we had reviewed the record and found no evidence of fraud or bad faith on the part of the contracting officer or other procurement officials. TIMCO complains that our decision did not indicate what material we had reviewed before making this statement and casts doubt on our review because we did not request a report from the contracting agency. Even though TIMCO filed this issue in an untimely manner, we carefully reviewed TIMCO's allegations and the contracting officer's "Request to Award Prior to Resolution of GAO Protest" upon which TIMCO's allegations were based. That review did not uncover any evidence of fraud or bad faith by the contracting officer or other agency procurement officials. Since TIMCO did not make a showing of fraud or bad faith in this case, we did not feel the need to request a report on this matter from the Air Force or to pursue the issue further, especially in view of the fact that the issue was untimely filed. See, for example, Brogart, Inc., B-195208, March 5, 1980, 80-1 CPD 173.

Accordingly, since there has been no showing of error of fact or law in our prior decision, see 4 C.F.R. § 20.9 (1980), that decision is affirmed.

Harry S. Van Clence

For the Comptroller General
of the United States