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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SDM Corporation--Reconsideration

File: B-234471.2

Date: April 18, 1989

DIGEST

Prior dismissal as untimely of protest asserting that agency improperly did not reconsider nonresponsibility determination based on alleged new information submitted by protester is affirmed where protest was filed more than 10 working days after protester learned of initial adverse agency action on agency-level protest.

DECISION

SDM Corporation requests reconsideration of our dismissal of its protest of February 13, 1989, as untimely under request for proposals (RFP) No. DAAA09-88-R-0327, issued by the Army Materiel Command (AMC) for the acquisition of collective protection equipment. SDM essentially stated in its protest that the contracting officer erroneously determined that SDM was not a responsible prospective contractor. We dismissed the protest because it was not filed within 10 days of SDM's learning of adverse action on the protest it had filed with the agency, as required by our Bid Protest regulations, 4 C.F.R. § 21.2(a)(3) (1988).

We affirm our prior dismissal.

The agency conducted a preaward survey of SDM, the apparent low offeror, on August 24, 1988. The survey team recommended "no award" based primarily on unsatisfactory findings with respect to SDM's production capability and its quality assurance capability. In addition, while recognizing that SDM had been producing under a quality assurance procedure, MIL-I-45208A, pursuant to contract No. DAAA15-86-C-0083, the survey team found that several requirements of MIL-I-45208A were not being met by SDM under that contract. The agency pointed out, and the protester does not dispute, that the quality assurance requirements of MIL-Q-9858A, the

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applicable requirement under the proposed contract, is more stringent than MIL-I-45208A. Finally, the survey team determined that award of the proposed contract, would tax SDM's facility beyond its production capability.

By letter of August 29, SDM protested the award of the contract to any other offeror. It objected to the anticipated rejection of its proposal for quality assurance deficiencies. On September 28, based on the recommendation of the preaward survey and based on the fact that SDM was on a list comprised of contractors with poor performance records, the contracting officer executed a determination of nonresponsibility. Because SDM was a small business concern, the contracting officer referred the matter to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC). By letter dated November 9, SBA advised SDM that it found "no significant reason to set aside the contracting officer's finding and determination of nonresponsibility."

By letter dated November 9 to the agency, SDM "confirmed its earlier protest" of any action on the part of the agency which would result in the award of a contract under the RFP to any other offeror other than SDM. The protester argued that it was currently producing the identical item required by the RFP. AMC denied the protest by letter of November 25. By letter of November 29, the protester requested that the contracting officer reconsider her denial of the protest. SDM again argued that the preaward survey failed to give any consideration to the fact that SDM was currently producing the identical unit under another contract. By letter of February 1, 1989, the contracting officer denied the request for reconsideration.^{1/} On February 13, SDM filed its initial protest with our Office

^{1/} In the letter, the contracting officer asserted that notwithstanding SDM's performance history under MIL-I-45208A, the current RFP requires the contractor to perform in accordance with the quality assurance provisions of MIL-Q-9858A, which are substantially more stringent than those of MIL-I-45208A. The agency stated that compliance with MIL-I-45208A in no way assures the government that the requirements of MIL-Q-9858A can or will be met. Further, the agency pointed out that SDM presented no evidence relative to the area of production capability which was identified in the preaward survey as a deficiency.

generally objecting to the contracting officer's nonresponsibility determination dated September 28, 1988, although subsequent events were mentioned. We dismissed the protest as untimely.

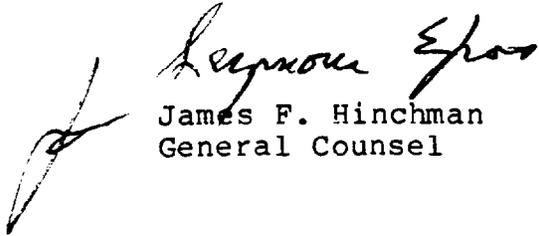
SDM now argues in its March 6, 1989, request for reconsideration that the basis of its protest was that the contracting officer violated Federal Acquisition Regulation § 19.602-4(a) (FAC 84-12), which provides that if new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible, the contracting officer shall reverse the determination of nonresponsibility. SDM asserts that the contracting officer, in failing to reconsider the nonresponsibility determination, did not consider the fact that it is producing the identical product under another contract. The protester characterizes this current production of the identical product as "new information" which it submitted to AMC after the initial nonresponsibility determination. SDM states that it was not until it received the contracting officer's letter of February 1 that it learned that the contracting officer failed to reconsider her nonresponsibility determination in light of this new information and in light of her "continuous obligation" to do so until award is actually made. Apparently, no award has yet been made.

The record does not support the protester's position. The record shows that the protester raised this allegedly new information concerning its current production of the identical item in its letters of August 29 and November 9. Thus, the agency's letter of November 25 denying SDM's protest constituted initial adverse agency action concerning this issue. The protest to us of February 13, filed more than 10 working days after SDM received notice of this initial adverse agency action, therefore was untimely and our dismissal was proper.

We point out that, despite the protester's assertions, the record shows that the contracting officer did consider that the protester was producing the identical product and did consider the protester's performance under contract

DAAA15-86-C-0083 in producing that item. In fact, it was SDM's inadequate performance under that contract that was a significant reason for the nonresponsibility determination.

We affirm our prior dismissal.



James F. Hinchman
General Counsel