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Pollack



Comptroller General
of the United States

Washington, D.C. 20548

127923

Decision

Matter of: Rent-A-Can, Inc.--Reconsideration

File: B-254356.2

Date: September 21, 1993

Daryl D. Burnett for the protester.
Catherine E. Pollack, Esq., and David Ashen, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Request for reconsideration of dismissal of protest as
untimely is denied where protester fails to show that
General Accounting Office's conclusion as to when protester
learned of basis for protest was in error.

DECISION

Rent-A-Can, Inc. requests reconsideration of our August 27,
1993, decision dismissing as untimely its protest of a con-
tract award under invitation for bids (IFB) No. DAKF36-93-B-
0001, for rental and servicing of portable chemical toilets
at Fort Drum, New York.

We deny the request.

Rent-A-Can submitted the low responsive bid at the
January 26, 1993, bid opening. The agency conducted a
preaward survey of the firm, and found it to be
nonresponsible. As Rent-A-Can is a small business, the
agency referred the matter to the Small Business
Administration (SBA) for a certificate of competency (COC)
review. Due to a change of address, Rent-A-Can never
received the COC application that SBA sent. Consequently,
SBA did not receive a completed COC application from Rent-A-
Can by the established deadline, and therefore accepted the
Army's nonresponsibility determination.

On June 11, Rent-A-Can contacted the Army and asked that the
contracting officer request SBA to reopen the COC case since
the firm had inadvertently missed the filing deadline.
Although Rent-A-Can and the Army disagree as to the Army's
stated position on whether the COC case should be reopened--
Rent-A-Can asserts that the contracting officer agreed to
reopen the case, while the Army states otherwise--the record

is clear that Rent-A-Can learned in a June 15 telephone conversation with an SBA representative that the contracting officer would not reopen the COC case. On June 16, Rent-A-Can faxed a letter to the agency essentially asking that it reconsider its decision; the agency apparently did not respond to the letter. Rent-A-Can later learned that the contract was awarded on June 17 to the next low bidder.

On July 1, approximately 5 days after learning of the award, Rent-A-Can filed a protest with the contracting officer alleging that the officer improperly had failed to reopen the firm's COC case. The contracting officer denied the protest on July 15, finding that it was not filed within 10 working days after Rent-A-Can learned of its basis for protest, as required by Federal Acquisition Regulation (FAR) § 33.103(b)(2). Upon receiving the agency's decision on August 23, Rent-A-Can filed a protest with our Office, arguing that its agency-level protest was timely because it was filed less than 10 days after the firm learned of the award to another bidder.

We dismissed Rent-A-Can's protest on the basis that Rent-A-Can's agency-level protest was untimely. In this regard, we concluded that Rent-A-Can's basis of protest was not the award to another bidder, but instead was the contracting officer's refusal to reopen the COC case; Rent-A-Can learned of this protest basis no later than June 15, the date of its telephone conversation with SBA. Since our Bid Protest Regulations provide that a matter initially protested to an agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office (in this case, not later than 10 working days after the basis for protest was or should have been known), and Rent-A-Can's July 1 agency-level protest was not filed within this time limit, the subsequent protest to our Office was also untimely. See 4 C.F.R. §§ 21.2(a)(2) and (a)(3) (1993); Tandy Constr., Inc., B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206.

In its reconsideration request, Rent-A-Can challenges our conclusion that its basis for protest was not the award itself, pointing out that its agency-level protest expressly stated that it was a protest of the award. Notwithstanding Rent-A-Can's characterization of its protest, however, it is clear that the reason Rent-A-Can protested the award was the contracting officer's refusal to reopen the COC case. Since Rent-A-Can knew on June 15 that the case would not be reopened, and that it therefore would not be eligible to receive the award, Rent-A-Can's time for filing a protest ran from that date, not the date it learned of the award to another bidder. See MIDDCO, Inc.--Recon., B-235587.2, Oct. 31, 1989, 89-2 CPD ¶ 402.

Rent-A-Can next argues that it did not know on June 15 that it would no longer be considered for the award. While acknowledging that SBA did inform the firm on that date of the Army's instructions not to reopen the COC case, Rent-A-Can asserts that SBA also stated that "any final decision in that regard must be made by the contracting officer." Rent-A-Can contends that it was not required to file a protest at that time, but instead could await agency action on its request for reconsideration of the decision not to reopen the COC case. We disagree.

A protester is charged with knowledge of its basis of protest at the point where agency personnel convey to the protester the agency's intent to follow a course of action adverse to the protester's interests. MIDDCO, Inc.--Recon., supra. In this case, the Army had already informed Rent-A-Can that it would furnish its decision on the COC matter directly to SBA. Thus, when SBA informed Rent-A-Can on June 15 of the Army's decision not to reopen the COC case, Rent-A-Can was on notice of the agency's intent to follow a course of action adverse to its interests, and was required to file its protest within the next 10 working days. See Kimmins Thermal Corp.--Recon., B-238646.4, Jan. 31, 1991, 91-1 CPD ¶ 106. Rent-A-Can was not entitled to wait to file its protest until it determined whether the contracting officer would reconsider his decision not to reopen. See Tandy Constr., Inc., supra.

As Rent-A-Can has not established that our decision contained any errors of fact or law, or presented new information that warrants its reversal or modification, the request for reconsideration is denied. See R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

Ronald Berger

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Associate General Counsel