

DECISION



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

FILE: B-219173.2

DATE: October 28, 1985

MATTER OF: Sermor, Inc. -- Request for Reconsideration

DIGEST:

1. Issue raised for first time in request for reconsideration will not be considered unless the request itself is a timely protest.
2. Contention that contracting agency officials acted fraudulently and in bad faith in determining that protester was not responsible, first raised in request for reconsideration but based on some allegations made in original protest, is untimely and will not be considered since the request was not filed within 10 days of filing of original protest, the date on which, at the latest, the protester knew or should have known the basis of protest.
3. Challenge to denial of certificate of competency (COC) by Small Business Administration (SBA) on grounds that SBA officials acted fraudulently and in bad faith, first raised in request for reconsideration, is untimely and will not be considered since request was not filed within 10 days after the protester was notified that its COC application had been denied, and thus knew or should have known the basis of protest.

Sermor, Inc., a small business, requests reconsideration of our decision Sermor, Inc., B-219173, July 17, 1985, 85-2 CPD ¶ 56, dismissing its protest challenging the Army's determination that Sermor was nonresponsible under invitation for bids (IFB) No. DAAE07-85-B-A070, issued by the Army Tank-Automotive Command, Warren, Michigan. We affirm our original decision.

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In its original protest, Sermor contended that the preaward survey on which the Army's negative responsibility determination was based did not fairly consider Sermor's financial capability or its performance on prior contracts. In addition, because the Army has repeatedly relied on similar preaward surveys as the basis for finding Sermor nonresponsible, Sermor contended that it had been debarred de facto by the Army.

The Army advised us that the nonresponsibility determination had been referred to the Small Business Administration (SBA), which had declined to issue a certificate of competency (COC) to Sermor. In light of SBA's authority under 15 U.S.C. § 637(b)(7) (1982) to conclusively determine the responsibility of small businesses, we generally do not review negative responsibility determinations when a small business is involved, unless there is a showing of possible fraud or bad faith on the part of government officials. See Bid Protest Regulations, 4 C.F.R. § 21.3(f)(3) (1985). Since Sermor did not allege, and we saw no evidence, that the Army contracting officials acted fraudulently or in bad faith, and Sermor did not challenge SBA's denial of the COC, we dismissed the protest. In addition, we found no basis on which to object to the Army's repeated reliance on findings in the preaward surveys as a de facto debarment of Sermor, in light of SBA's independent review and conclusive determination of Sermor's responsibility.

In its request for reconsideration Sermor now contends that the Army contracting officials acted fraudulently and in bad faith in making the nonresponsibility determination. In addition, Sermor for the first time challenges the SBA's denial of the COC, alleging fraud and bad faith on the part of SBA officials as well. The primary basis of this contention is that the SBA officials failed to consider evidence which Sermor believes shows that it is a responsible firm.

We find that Sermor's contentions regarding the Army's nonresponsibility determination are untimely and therefore will not be considered. Sermor's allegations of fraud and bad faith are based on the same factual allegations made in its original protest. Sermor thus has simply recast its argument in an attempt to bring its protest within the exception in our regulations under which we will review protests challenging nonresponsibility determinations. Our regulations do not contemplate such piecemeal presentation of arguments, however, and we will not consider allegations raised for the first time in

a request for reconsideration unless the request itself constitutes a timely protest. Allied Bendix Aerospace, B-218869.2, June 6, 1985, 85-1 CPD ¶ 651. Since Sermor's request for reconsideration relies on the same allegations raised in its original protest, the basis for its argument that the Army officials acted fraudulently and in bad faith should have been evident, at the latest, when the original protest was filed. Our regulations require that a protest based on such allegations be filed within 10 days after the protester knew or should have known the basis for protest. 4 C.F.R. § 21.2(a)(2). Since Sermor's request for reconsideration was not filed until August 7, considerably more than 10 days after the original protest was filed on June 18, it cannot be considered as timely raising the issue.

We also find untimely Sermor's allegations regarding the SBA's denial of the COC. Sermor contends in its request for reconsideration that it was never notified by the SBA that its COC application was denied. The SBA states that it sent Sermor a letter dated May 15, 1985, notifying Sermor of the SBA's decision. While a copy of the letter addressed to Sermor indicates that it was to be sent by certified mail, the SBA states that in fact it was sent by regular mail, and, as a result, there is no receipt showing delivery to Sermor.

Even assuming that Sermor did not receive the SBA's May 15 letter, however, Sermor concedes that it was notified that award had been made to another bidder during a telephone conversation with the contracting officer on June 11. The Army report states that, during that conversation, Sermor also was advised that its COC application had been denied by SBA; since Sermor does not refute this statement, we see no basis on which to challenge the Army's contention that the contracting officer notified Sermor. Moreover, Sermor was involved in, and thus had contemporaneous knowledge of, the events which occurred during SBA's consideration of Sermor's COC application on which Sermor's allegations of fraud and bad faith are based, primarily, SBA's failure to consider relevant information regarding Sermor's past performance and financial capability and an alleged expression of bias by an SBA official. Thus, Sermor should have raised its challenge to the SBA determination within 10 days of being notified of award on June 11, since Sermor was already aware of the events on which its argument is

based and should have known that its COC application had been denied after the June 11 conversation with the contracting officer. Since the issue was not raised until the request for reconsideration was filed on August 7, this basis of protest also is untimely and will not be considered.

Sermor also objects to our dismissal of its original protest without giving Sermor an opportunity to comment on the Army's statement that the nonresponsibility determination had been referred to SBA. Section 21.3(f) of our Bid Protest Regulations, 4 C.F.R. § 21.3(f) provides in pertinent part:

" . . . When the propriety of a dismissal becomes clear only after information is provided by the contracting agency or is otherwise obtained by the General Accounting Office, it will dismiss the protest at that time."

In such circumstances, interested parties are not afforded an opportunity to file comments. Here, the Army's statement, which Sermor does not dispute, that the Army's nonresponsibility determination had been referred to SBA justified summary dismissal of the protest under our regulations; as a result, Sermor was not entitled to an opportunity to file written comments before its protest was dismissed. 4 C.F.R. § 21.3(f)(3); Sermor, Inc. -- Reconsideration, B-220041.2, Oct. 8, 1985, 85-2 CPD ¶ ____.

Since the protester has failed to demonstrate a basis upon which to modify our dismissal of its protest, our prior decision is affirmed.

for Seymour Efron
for Harry R. Van Cleve
General Counsel