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The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: General Marine Construction Corporation--  
Reconsideration  
File: B-228250.2  
Date: October 9, 1987

### DIGEST

Protest of affirmative determination of responsibility which did not allege, much less show, fraud or bad faith on the part of procuring officials properly was dismissed pursuant to General Accounting Office's (GAO's) Bid Protest Regulations. Contracting officer's alleged remark that protest was "futile," made when copy of it was hand-delivered to him, does not constitute virtually irrefutable proof that he determined lower-priced bidder responsible out of a specific and malicious intent to injure the protester; therefore, showing which is prerequisite to GAO review of matter has not been made.

### DECISION

General Marine Construction Corporation requests that we reverse our dismissal of, and consider on the merits, its protest of the proposed award of a contract to Frank L. Woodworth, Inc., by the New England Division, Army Corps of Engineers, under invitation for bids No. DACA33-87-B-0042, for the demolition of a wooden pier.

We affirm our dismissal.

General Marine's protest was in the form of a brief telegram, the substantive part of which stated that Woodworth "was and is not responsible, by virtue of having no past or present experience in marine construction and demolition." We dismissed the protest pursuant to a provision of our Bid Protest Regulations which recognizes that a determination that a bidder is capable of performing a contract is basically a subjective judgment not susceptible of reasoned review, as a result of which we will not review such a determination absent a showing that it was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5) (1987).

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General Marine now states in its request for reconsideration that it "hereby alleges bad faith on the part of the contracting agency personnel." The basis for this new assertion is that when General Marine delivered to the contracting officer a copy of the protest telegram which it had dispatched to us, along with a concurrent agency-level protest, that person allegedly stated that the protest was "futile" before even reading its contents. The protester maintains this evidenced a "prejudgment" on the part of the agency.

As we have indicated above, our Bid Protest Regulations, which are published in the Federal Register and Code of Federal Regulations, specifically state that protests of affirmative determinations of responsibility will be summarily dismissed "absent a showing" of fraud or bad faith. The initial protest which General Marine filed with our Office did not even mention fraud or bad faith, much less attempt to show that it had occurred. This is understandable since the sole event on which the protester now relies as evidence of bad faith had not yet transpired when its protest was filed with us. In the absence of any reference whatsoever to fraud or bad faith in the initial protest it was properly dismissed under the standards set forth in our Regulations.

To make a showing of fraud or bad faith the protester has a heavy burden of proof; it must demonstrate by virtually irrefutable proof that procuring officials had a specific and malicious intent to injure the protester. Stephan Wood Products, Inc., B-225631, Apr. 1, 1987, 87-1 C.P.D. ¶ 369. It is clear from the correspondence which the protester has provided us that it discussed its impending protest with the contracting officer by telephone prior to delivering a copy of it to him. That official therefore knew the basis for General Marine's protest even before he received it. We do not regard the fact that he may have expressed disagreement with the protester, or predicted that the protest would be unsuccessful, prior to reading the written protest to constitute virtually irrefutable proof that contracting officials had determined to make award to a bidder who was not responsible out of a specific and malicious intent to injure General Marine. Neither the initial protest nor the request for reconsideration, therefore, makes the showing of fraud or bad faith which is a prerequisite to our review of an affirmative determination of responsibility and our file remains closed.

  
James F. Hinchman  
General Counsel