UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-220381.2

June 3, 1986

The Honorable William L. Armstrong
United States Senator
311 Steele Street
Denver, Colorado 80206

Dear Senator Armstrong:

This is in response to the letter of March 21, 1986 from your Staff Assistant, Joann L. Gelvin, requesting our views on concerns about our bid protest procedures expressed in correspondence from Mr. Don T. Moore, President of Power Line Models, Inc. Ms. Gelvin also expressed your interest in whether legislation might be helpful with respect to matters raised by Mr. Moore.

Mr. Moore's firm recently protested to our Office concerning the Department of Energy's selection of Uhl and Lopez Engineers, Inc. for work at the Los Alamos National Laboratory, Los Alamos, New Mexico. The protest raised essentially three issues. Power Line Models believed that its proposal was unfairly evaluated, that the agency's evaluation panel was biased, and that a potential conflict of interest arose when the awardee was acquired by another contractor for the Department of Energy.

We reviewed the procurement record and concluded that there was a reasonable basis for selection of Uhl and Lopez. Both firms' proposals were considered to be excellent, and they tied in the total number of points awarded. Since two out of three evaluation panel members had ranked Uhl and Lopez first, the panel recommended that firm for selection. We also concluded that Power Line Models was merely speculating regarding bias on the part of the evaluation panel, and we found no evidence of a potential conflict of interest. As a result of these findings, we denied the protest.

Based on the experience of Power Line Models in this recent protest, Mr. Moore believes that our bid protest procedures do not provide a satisfactory means of ensuring

compliance with the procurement laws and regulations. He suggests that several aspects of our procedures should be revised. We address each of his concerns below.

Burden of Proof

Mr. Moore states that in a bid protest proceeding, the burden of proof is on the protester, and that the General Accounting Office (GAO) will not "second guess" an agency's selection decision. He contends that GAO's review standard prevents "valid" protests from being sustained. It is true that protesters bear the burden of establishing their cases, in the sense that GAO will not substitute its preference in matters that are primarily reserved for the judgment of an agency, so long as the agency did not violate the law or otherwise abuse its discretion. On the other hand, as discussed below, when the protester and the agency differ with respect to an issue of fact, we accept the version that is more likely in light of evidence in the record.

When issues involving the exercise of discretion by a contracting agency are raised, we review the agency action to determine whether it lacks a reasonable basis, so as to be regarded as arbitrary and capricious. Wickman Spacecraft & Propulsion Co., B-219675, Dec. 20, 1985, 85-2 CPD ¶ 690. The same standard of review is used by the United States Claims Court and the federal district courts in considering lawsuits that are similar to bid protests in the sense that they are brought by disappointed bidders or offerors seeking declaratory and injunctive relief against agency contracting decisions. See Drexel Heritage Furnishings, Inc. v. United States, 7 Cl. Ct. 134, 142 (1984); Princeton Combustion Research Laboratories, Inc. v. McCarthy, 674 F.2d 1016, 1021-1022 (3d Cir. 1982); M. Steinthal and Co. v. Seamans, 455 F.2d 1289, 1300-1302 (D.C. Cir. 1971).

This standard recognizes that the contracting agency, not GAO or any other reviewing body, is responsible for its procurement actions. It is not, nor should it be, our function to "second guess" a decision that is within an agency's legal discretion. For example, in connection with its protest, Power Line Models wanted our Office to reevaluate the technical merits of the proposals. If we had been the procuring agency, we might have rated the two offerors higher on some criteria or lower on others--the evaluators themselves differed regarding the relative strength and weaknesses of the firms. Our function, however, was properly limited to determining if agency

officials acted unreasonably or otherwise violated applicable statutes and regulations. In Power Line Models' case, the two competitors were exceedingly closely ranked, and we could not conclude that the technical evaluations and the selection of Uhl and Lopez were unreasonable.

With respect to disputed questions of fact, we do not assume that an agency's presentation is correct. On the contrary, where there is a conflict between the protester's and the agency's versions of the facts, we will accept the protester's version if the evidence in the record supports the protester's assertions over the agency's. See, e.g., Price Waterhouse--Reconsideration, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ (GAO accepted the protester's account of discussions with the agency); CoMont Inc., B-219730, Nov. 14, 1985, 65 Comp. Gen. ____, 85-2 CPD ¶ 555 (GAO accepted the protester's statement that it was not orally advised of a change in a solicitation); Automated Datatron, Inc., et al., B-215399 et al., Dec. 26, 1984, 84-2 CPD ¶ 700 (GAO accepted the protester's assertion that an irregularity in its proposal was the fault of the agency).

Mr. Moore's contention that our standard of review forecloses the ability of protesters to prevail is not borne out by the record. Enclosed is a copy of our report to the Congress regarding bid protests in fiscal year 1985. Enclosure G to the report summarizies sustained cases and others in which corrective action was recommended.

Time Limits

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1985), generally require a protest to be filed within 10 working days after the basis for the protest is known. Mr. Moore is concerned about the difficulty of obtaining evidence in that 2 week period.

We believe that the 10-working day rule is reasonable and equitable. It does not begin to run in the first instance until the protester has evidence upon which to base its protest, i.e., more than mere suspicion or rumor. Moreover, our regulations do not preclude the protester from submitting additional information in a timely manner after a protest is filed. For example, we recently reconsidered a decision denying a protest and sustained the protest based upon information discovered by the protester after we issued our initial decision. Pacific Sky Supply, Inc.--Reconsideration, B-219749.2, Apr. 2, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ ____. Also, often the information that a protester wishes us to consider is included in the

procuring agency's administrative report, and need not be separately obtained and filed by the protester.

Our 10-working day rule represents an effort to balance the needs of the protester for time to prepare its case and the needs of parties to obtain a final resolution of the dispute as quickly as possible. Raising a legal objection to the award of a government contract is a serious matter. At stake are not only the rights and interests of the protester, but those of other interested parties, often including an intended or actual awardee of a contract, as well as the contracting agency. Effective and equitable procedures are necessary so that parties have a fair opportunity to present their cases and protests can be resolved in a reasonably speedy manner. See Cessna Aircraft Co. et al., 54 Comp. Gen. 97 (1974), 74-2 CPD ¶ 91. In the past we have revised our timeliness rule for initiating protests when we believed that it did not accomplish these goals. See 40 Fed. Reg. 17979 (1975) (extending the period for filing a protest from 5 to 10 working days). The current rule does not, however, appear to be unreasonable or be inequitable.

Confidential Submissions

Mr. Moore's final concern involves the risk to employees of the procuring agency that is inherent in submitting information to the GAO in support of a protest (presumably in the nature of potential retribution by others in the agency). He advocates that we interview agency personnel individually so that they can submit information confidentially.

Possible reprisals for agency "whistle-blowers" cannot be satisfactorily addressed in the context of an adversarial forum such as our bid protest proceedings. Our procedures are designed to provide an opportunity for all interested parties to address the legal issues and facts raised in a protest to the extent permitted by law and regulation. The Congress emphasized the importance of this policy in the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(f) (West Supp. 1985), by requiring procuring agencies to disclose all documents relevant to a protest that would not give a party a competitive advantage and that the party is otherwise authorized to receive.

The proposal by Mr. Moore that we consider, as a basis for decision, the testimony of an individual--without disclosing the individual's identity or, in order to prevent disclosure of his identity, the testimony

itself--raises substantial questions of fairness to the other parties involved. We do not believe that our consideration of evidence provided by one party on a confidential basis--except as may be necessary because of applicable law or regulation--would adequately protect the rights and interests of the other parties to the protest. While we cannot accept evidence secretly, if a government employee confidentially discloses to a protester facts that can be established through means other than his own testimony and the protester asserts those facts, we will of course consider them to the extent they are supported by evidence in the record.

Conclusion

The Congress recently codified our bid protest authority in the Competition in Contracting Act of 1984. We are currently reviewing our regulations and practices based on our first year of experience under the act to determine whether changes in our regulations may be justified. While we do not currently envision any changes that relate to the concerns expressed by Mr. Moore, we will consider his correspondence during the course of that review. Further, at this time, we do not believe any legislative consideration with respect to Mr. Moore's concerns is warranted.

We trust that this letter responds to your interest in the matters raised by Mr. Moore.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel

Enclosure