

11443

GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to:

B-195961

SEP 14 1979

The Honorable Orrin G. Hatch
United States Senate

Dear Senator Hatch:

We refer to your letter dated August 24, 1979, bringing to our attention a matter of concern to certain small business constituents of yours and protesting any award of a contract under invitation for bids (IFB) F42650-79-E3602 issued by Hill Air Force Base, Ogden, Utah.

[Protest Concerning]

At issue is the requirement in the solicitation for a performance bond. We understand that it is your desire that this Office issue a decision requiring the Air Force to revise the solicitation to eliminate the requirement. In view of the relief requested, the matter must be decided under our Bid Protest Procedures, and we regret to advise you that the protest must be dismissed as untimely filed.

*ABC 3/12
AC C 00002*

Our procedures are designed to ensure the prompt resolution of bid protests at an early stage of the procurement process. They therefore require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed before bid opening. 4 Code of Federal Regulations (CFR) § 20.2(b)(1) (1979). Because the requirement for a performance bond was apparent from the solicitation, a protest on this basis should have been filed with GAO or the Air Force before bid opening, July 24, 1979.

Your staff has advised us that a protest initially was lodged with the Air Force prior to bid opening but was not pursued here until one month after the bid opening. If a timely protest has been filed initially with the procuring agency, any subsequent protest to GAO must be filed within 10 days of formal notification of or actual knowledge of initial adverse agency action. 4 C.F.R. § 20.2(a). Where an initial protest to an agency concerns alleged improprieties in a solicitation, the opening of bids without taking corrective action constitutes initial adverse agency action within the meaning of our procedures. Therefore, the protest filed at GAO one month after bid opening is untimely and we must advise you we could not decide the merits of the protest.



Letter 007017

B-195961

We wish to point out for the information of your constituents that they may file a protest directly with this Office even though they may be unable or unwilling to participate in a procurement because of a bonding requirement. We enclose a booklet which describes our bid protest process.

In connection with your request that we review a letter from the Small Business Administration to the contracting officer concerning this matter, we have been in contact with your staff to obtain a copy of that letter but it has not been received in time to comment upon here. In view of our conclusion that this protest must be dismissed as untimely filed we would not issue a decision on the merits. However, for your information, we note that this Office has held that the conclusive authority vested in the Small Business Administration concerning determinations of the capacity and credit of small business concerns (matters closely related to the necessity for bonding) does not prevent procuring agencies from requiring bonds of small business firms if a contracting officer determines for financial reasons that a bond is needed to protect the Government. See Abbott Power Corporation, B-183847, October 2, 1975, 75-2 CPD 207. Moreover, we have opposed exempting small businesses, generally, from bonding requirements because any exemption could subject contracting agencies to undue financial risk and would place small businesses at an unfair competitive advantage when participating in non-set-aside procurements.

Sincerely yours,

MILTON SOCOLAR

Milton J. Socolar
General Counsel

Enclosure