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DECISION

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

FILE: B-190516

DATE: December 9, 1977

MATTER OF: Banner Engineering Corporation

DIGEST:

1. Protest filed with procuring activity after bid opening date alleging impropriety in solicitation (i.e., invitation for bids should have included partial small business set-aside) is untimely under 4 C.F.R. § 20.2(b)(1) (1977) and not for consideration on merits.
2. Decision as to whether procurement should be set aside for small business is within authority of procuring agency, not GAO.

The Defense Construction Supply Center (DCSC), Columbus, Ohio, issued invitation for bids (IFB) DSA700-77-B-1815 for the procurement of 28,500 filter elements. The solicitation was provided to bidders which could offer an item that had been tested and qualified on Qualified Products List 52308-8. September 26, 1977, was set as the bid opening date.

By letter dated October 5, 1977, Banner Engineering Corporation (Banner) filed a protest with the DCSC alleging in substance that the IFB should have included a partial set-aside for small business concerns. The contracting officer denied the protest by letter dated October 17, 1977. Banner subsequently filed a protest with our Office on October 25, 1977.

The Defense Logistics Agency (DLA) states in substance that Banner's protest alleges an impropriety in the solicitation, and since the protest was not filed with the procuring activity until after the date set for bid opening, it is untimely under GAO's Bid Protest Procedures, 4 C.F.R. part 20 (1977), even though Banner's subsequent protest to our Office was filed within 10 working days after receipt of the contracting officer's letter.

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GAO's Bid Protest Procedures, 4 C.F.R. § 20.2 (1977), provide in pertinent part that:

"(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In any case, a protest will be considered if filed with the General Accounting Office within the time limits prescribed in paragraph (b).

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

For the reasons stated by DLA, we agree that Banner's protest is untimely and not for consideration on the merits. Moreover, we have held that nothing in the Small Business Act or regulations makes it mandatory that there be a set-aside for small business and that the decision whether a procurement should be set aside is within the authority of the contracting agency. The Small Business Administration; Najol, Inc., B-188141, February 11, 1977, 77-1 CPD 104.

Based on the foregoing, the protest is dismissed.


Paul G. Dembling
General Counsel