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DECISION



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

FILE: B-209753.2

DATE: January 10, 1983

MATTER OF: Polaroid Corporation -- Reconsideration

DIGEST:

Procedural requirements of Administrative Procedure Act do not apply to interpretation of timeliness rules of GAO Bid Protest Procedures, announced in published decision of Comptroller General, since (1) GAO, as legislative branch agency, is not subject to the Act, (2) the Act does not apply to public contract matters, and (3) Act in any event does not apply to interpretations, as opposed to substantive changes, of published rules.

Polaroid Corporation requests that we reconsider our decision Polaroid Corporation, B-209753, December 1, 1982, 82-2 CPD _____, in which we dismissed as untimely Polaroid's protest of a small business set-aside. Polaroid contends that the dismissal is contrary to the provisions of our Bid Protest Procedures and violates the Administrative Procedure Act. We affirm the prior decision.

Polaroid originally protested the set-aside decision (in connection with an item included in solicitation No. GSA-3YC-N-020, issued by the General Services Administration) to the contracting officer, who denied the protest. One month later, on the date set for receipt of proposals, Polaroid filed its protest here. We viewed the protest here as untimely because it was not filed within 10 days of Polaroid's learning of the contracting officer's denial of the protest, as required by section 21.2(a) of our Procedures (4 C.F.R. § 21.2(a) (1982)).

In so doing, we noted that while our Procedures were susceptible to the interpretation that a protest based on an alleged solicitation deficiency would be timely if filed with this Office prior to the time set for receipt of proposals, regardless of whether there had been an earlier denial of a protest lodged with the agency, a contrary interpretation had been adopted in Informatics, Inc., 58 Comp. Gen. 750 (1979), 79-2 CPD 159, aff'd B-194322, December 3, 1979, 79-2 CPD 387.

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Polaroid now asserts that the interpretation adopted in Informatics is contrary to the plain meaning of section 21.2 of our Procedures, that it therefore constitutes a substantive change to our Procedures, and that for it to be effective it must be promulgated only after the requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. (1976 and Supp. IV 1980), including notice of proposed rulemaking and opportunity for comment, have been met.

The simple answer to this assertion is that the General Accounting Office, as a legislative branch organization, is not subject to the APA. See 5 U.S.C. § 551(1)(A); Cherokee Leathergoods, Inc., B-205960.2, December 27, 1982, 82-2 CPD ____; Ex-Cell Fiber Supply, Inc., B-207028, December 14, 1982, 82-2 CPD ____ . Moreover, the APA generally does not apply to matters involving public contracts. 5 U.S.C. § 553(a)(2); Northwest Independent Forest Manufacturers--Reconsideration, B-207711.2, August 31, 1982, 82-2 CPD 192; see Starline, Inc., 55 Comp. Gen. 1160 (1976), 76-1 CPD 365.

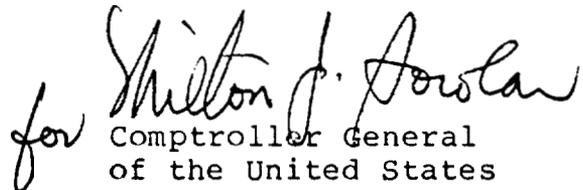
In addition, we do not believe that the rule announced in Informatics represents a change to our published Procedures. In Informatics, we noted that the last sentence of section 21.2(a) "could reasonably lead to the belief" that the strict 10-day rule of that section and of its predecessor section (see 36 Fed. Reg. 24791, December 23, 1971) was not intended to apply in the Informatics (and Polaroid) situation. We then indicated that such an interpretation would be contrary to our intention, which was stated in the opening sentence of our Procedures to be to provide for "the expeditious handling of bid protests," and that in the future the strict 10-day rule would be applied. (We did not enforce the rule against Informatics because of the possibility that the company had misread the intent of the Procedures.) We believe we did no more in Informatics than resolve an ambiguity in the language of the Procedures which, we felt, could have reasonably led to an interpretation that was inconsistent with our intention and with one of our overall purposes in issuing the Bid Protest Procedures. Our resolution of this ambiguity

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did not involve a change from the "plain meaning" of the Procedures; rather, it was merely an authoritative interpretation of the Procedures to make clear what had been intended all along. As Polaroid recognizes, the APA is not applicable in such a situation. See 5 U.S.C. § 553 (b), (d).

In short, we believe application to Polaroid of the interpretation announced in Informatics (and followed subsequently, see, e.g., American Marine Decking Systems, Inc., B-197987, September 22, 1980, 80-2 CPD 217) was inconsistent with neither our Procedures nor the APA. In addition, given that the Informatics decision was readily available (through volume 58 of the published decisions of the Comptroller General as well as through other means) to the procurement community and any other interested parties, we do not believe Polaroid can legitimately assert that it should not have known of the decision or that it otherwise has been treated unfairly.

The prior decision is affirmed. We point out, however, that we intend to clarify the matter at issue here in the next revision to our Procedures.

for 
Comptroller General
of the United States