

**DECISION**

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

FILE: B-211589

DATE: May 9, 1983

MATTER OF: Richmond Gear

**DIGEST:**

1. Protest filed after award that a solicitation should have contained a requirement for first article approval testing is untimely, since a protest based upon an alleged solicitation impropriety must be filed prior to bid opening.
2. Possibility of a buy-in is not a proper basis upon which to challenge the validity of an award.
3. GAO does not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith by procurement officials or misapplication of a definitive responsibility criterion.

Richmond Gear protests the award of a contract by the Department of the Army to B & R Machine Company, the low bidder under invitation for bids (IFB) No. DAAE07-83-B-H144 for gear sets. We dismiss the protest.

Richmond Gear contends that the specifications were defective in that they did not require first article approval testing despite the complexity of the items being purchased. Richmond Gear alleges that B & R is only a "marginal" producer that obtained the contract by submitting a below-cost bid, and does not have the capability to produce the item to the invitation's specifications.

Our Bid Protest Procedures require that a protest based upon alleged improprieties in an IFB that are apparent prior to bid opening be filed before that date. 4 C.F.R. § 21.1(b)(1) (1983).

Richmond Gear's complaint concerning the solicitation's omission of a first article approval testing requirement involves an alleged impropriety in the solicitation that was apparent before bid opening. Thus, this

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ground for protest should have been raised no later than that date. The protest, however, was not received either by the contracting agency or our Office until after award; consequently, this allegation is untimely raised and will not be considered. General Fire Extinguisher Corporation, B-198079, March 28, 1980, 80-1 CPD 234.

Concerning the alleged buy-in by B & R, we consistently have held that the possibility of a buy-in (the submission of a below cost bid) is not a proper basis upon which to challenge an award. See Harris Management Company, Inc., B-193049, May 30, 1979, 79-1 CPD 382. The allegation, and Richmond Gear's complaint that B & R cannot properly perform the contract, actually relate to whether B & R is a responsible concern. The award to B & R, however, necessarily included an affirmative determination of the awardee's responsibility, which involves a judgment that the awardee in fact has the capability to furnish the item at the bid price. See Defense Acquisition Regulation § 1-902, 1-904 (1976 ed.). We do not review an agency's affirmative determination of responsibility unless there is a showing of possible fraud or bad faith on the part of procuring officials or that the solicitation contained definitive responsibility criteria which the procuring officials failed to apply. Domar Industries Co., Inc., B-202735, September 4, 1981, 81-2 CPD 199. Neither exception is applicable here.

The protest is dismissed.

*Harry R. Van Cleve*

Harry R. Van Cleve  
Acting General Counsel