

DECISION



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

FILE: B-220963

DATE: November 15, 1985

MATTER OF: Denver X-Ray Instruments, Inc.

DIGEST:

1. The award of a contract is not improper merely because a contracting agency failed to solicit a potential bidder where there is no evidence that such failure resulted from a deliberate attempt on the part of the agency to exclude the potential bidder from the competition.
2. GAO does not review affirmative determinations of responsibility except under limited circumstances not present here.

Denver X-Ray Instruments, Inc. protests the Department of the Army's award of a contract to Technology for Energy Corporation under solicitation No. DAAG-46-85-R-D106. Denver states that the Army did not send it a copy of the solicitation, even though the Army was aware of Denver's product. The protester alleges that the Army therefore did not obtain full and open competition and contends that it can meet the Army's requirements at a lower price than Technology. Denver also alleges that Technology is bankrupt and may not be able to perform the contract. We dismiss the protest.

The award of a contract is not improper merely because an agency failed to solicit a particular potential bidder where there is no evidence that the agency's failure resulted from a deliberate attempt on the part of the agency to exclude the protester from competing. Key Airlines, B-214122, Feb. 27, 1984, 84-1 CPD ¶ 242. Denver has submitted no evidence to show that it was deliberately excluded from the competition. Therefore, we find no basis to question the agency's actions here.


Denver also asserts that Technology may lack the ability to perform the contract. This basis of protest concerns the Army's affirmative determination of

033796

30792

Technology's responsibility. See Tudor Inns of America, Inc., B-218944, June 11, 1985, 85-1 CPD ¶ 671. This Office does not review affirmative responsibility determinations absent a showing of possible fraud or bad faith on the part of the contracting officials or of a possible failure to apply definitive responsibility criteria contained in the solicitation. Id.; 4 C.F.R. § 21.3(f)(5) (1985). Denver has not alleged that either of the above exceptions is applicable here.

Accordingly, the protest is dismissed.


per Ronald Berger
Deputy Associate
General Counsel