DECISION

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

B-219657
FILE: B-219657.2 **DATE:** December 3, 1985

MATTER OF: Engineering and Professional Services

DIGEST:

1. Contracting agency has primary responsibility for determining which documents are subject to release to protester under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), and GAO will not question the agency determination in the absence of a showing of fraud or bad faith on the part of contracting officials.

2. GAO will not question the contracting officer's determination that the low offeror is nonresponsible where the offeror fails to demonstrate bad faith on the part of contracting officials or the lack of a reasonable basis for the contracting officer's conclusion that the offeror lacks adequate financial resources to successfully perform a contract at the offered price.

3. In determining the responsibility of the low offeror, the contracting officer is not bound by the recommendation in the preaward survey conducted by the Defense Contract Administration Services Management Area. Rather, he must himself make the final determination based not only upon the preaward survey but also on other information available to him.

4. GAO will not object to the contracting officer's decision, in determining whether the low offeror is a responsible offeror with sufficient financial resources to successfully perform the contract, to disregard the

financial resources of the separately incorporated offeror's parent company and of its proposed subcontractors, except to the extent that the parent company and proposed subcontractors have entered into a written commitment to make available such resources. The stockholders of a corporation are generally not liable on a contract made by the corporation, while subcontractors normally are not in privity with the government.

5. Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that closing date in order to be timely.

6. Where a protest has been filed initially with the contracting agency, any subsequent protest to GAO must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action in order to be timely.

7. Protesters have a duty to diligently pursue information which forms the basis of their protests within a reasonable time. Where the protester waits more than 3 months after the initial agency denial of its protest to file a Freedom of Information Act request for more detailed information, a subsequent protest to GAO allegedly based upon such information is untimely.

8. Untimely protest will not be considered under the significant issue exception to GAO's timeliness rules where the issue raised--exclusion from the competitive range--has been previously considered. Nor will the protest be considered under the good cause exception to the timeliness rules where there is no showing that some compelling reason beyond the protester's control prevented the protester from filing the protest.

9. Protest against rejection of second best and final offer (BAFO) for failure to include one of the required bills of material setting forth the list price to the government of various required material is denied. Omission was not a minor informality. Moreover, GAO will not question agency determination that correction by reference to the bill of material included in protester's first BAFO would have required reopening discussions and that reopening discussions and calling for a third round of BAFO's was inappropriate.

Engineering and Professional Services Incorporated (EPS) protests the award of a contract to a consortium of Siemens A.G./AT&T Technology Group (Siemens/AT&T) under request for proposals No. DAJA37-84-R-0430, issued by the United States Army Contracting Agency, Europe for the supply and installation of key telephone systems in the Federal Republic of Germany. EPS challenges the Army's determination that, depending upon the items in question, EPS was either nonresponsible, not the low bidder or had submitted an unacceptable offer. We deny the protest in part and dismiss it in part.

In August 1984, the Army solicited offers for meeting the Army's requirements over a base year and 2 option years for the supply and installation of standard key telephone systems (block A items), electronic key telephone systems (block B items), line/trunk conditioning equipment (block C items) and inside cable distribution systems (block D items) in Germany. The solicitation provided that award would be made by block to the responsible offeror submitting the low, technically acceptable offer for each block. As amended, the solicitation indicated that the government would evaluate offers for award by adding the total price for all options to the total price for the basic requirements.

The Army received seven offers by the January 14, 1985 closing date for receipt of initial proposals. Four firms were included in the competitive range for all four blocks and one additional firm was included for three of the

blocks. Although EPS' offer for block B was not considered to be technically acceptable, the contracting officer initially included EPS in the competitive range for block B as well as for the other blocks.

On March 19, the Army submitted written questions concerning their proposals to EPS and the other offerors, requiring answers to be returned by April 1. The Army viewed this as an opportunity to clarify or to make revisions in the proposals. EPS described its response as a "technical clarification" which in conjunction with its initial proposal constituted EPS' entire response to the solicitation.

Based upon EPS' answers to these questions, the contracting officer eliminated its proposal from the competitive range for block B, notifying EPS by letter of April 12 that its proposal had been eliminated for failure to meet "the United States Government's stated technical requirements." EPS' subsequent protest to the contracting officer was denied by letter of April 18 on the grounds that EPS' proposal for block B "no longer had a reasonable chance of being selected for contract award."

The Army meanwhile requested offerors to submit best and final offers (BAFO's), specifying certain aspects of their proposals for which clarification or revision were required. In addition, the Army amended the solicitation to require offerors to complete bills of material to be used in the evaluation of major material costs. The bills of material listed the material required for the major telephone systems included in the schedule of items and offerors were required to include a price for each piece of equipment, a total price for each system, and a "maximum percentage increase in prices for each option year."

After receipt and evaluation of the initial BAFO's, contracting officials realized that there was no mechanism for fixing material prices for the option years since offerors were only requested to state their "maximum" increase and the solicitation did not include an economic price adjustment clause or similar provision. Accordingly, discussions were reopened and offerors were required to submit a second BAFO by June 27, indicating fixed percentage increases for the option years. In addition, standard clauses from the Defense Acquisition Regulation, reprinted

in 32 C.F.R., pts. 1-39 (1983), were replaced by standard clauses from the Federal Acquisition Regulation (FAR), 48 C.F.R. pts. 1-51 (1984).

Prior to the new closing date, representatives of EPS verbally objected to requiring further BAFO's and, according to an EPS memorandum, warned that the request for a second BAFO "could be the subject of a protest." Since the contracting officer refused to relent, however, EPS submitted a revised offer.

After evaluating the second BAFO's, the contracting officer determined that EPS was in line for award for block A. Since, however, EPS had reduced its basic labor rate for the installation labor hours in block A from the base year $20 per hour offered in its initial proposal and the $18 per hour quoted in its first BAFO to the $13.50 per hour quoted in its second BAFO, and since the next low offer for block A was more than 20 percent higher than EPS' offer, the contracting officer determined that a preaward survey was required before EPS could be considered a responsible offeror for block A. Accordingly, he requested both the appropriate Defense Contract Administration Services Management Area (DCASMA) in the United States and contracting officials in Germany to conduct preaward surveys on EPS.

The preaward survey undertaken in Germany raised a number of questions concerning EPS' responsibility.

The solicitation provided that the "contractor shall be required to furnish host nation post, telephone and telegraph (PTT) approval authority for any equipment installed . . . which requires such approval prior to Government acceptance." The contracting officer indicates, and apparently contemporaneous government records appear to confirm, that contracting officials were informed by a representative of the Deutsche Bundespost (DBP), the German agency which regulates the telephone system in Germany, that the prime contractor would be required to obtain a license to work on public telephone lines in Germany even if it used a subcontractor which already had the necessary license and that before the prime contractor could obtain a license it must, among other requirements, have access to certain test equipment. Contracting officials were also informed that it would take approximately 1 month to obtain a business license and 3 months to obtain a DBP license. The German preaward survey report indicates that

contracting officials learned at a July 19 meeting with EPS representatives that the firm lacked a DBP license and that a repair shop with the required test equipment was not available to EPS.

The solicitation also required the contractor to maintain sufficient warehouse and office space to support all delivery orders issued against the contract. The German preaward survey team found that EPS' local office and warehouse space was inadequate to meet solicitation requirements.

Local contracting officials also conducted a financial analysis of EPS' offer for block A. EPS had previously stated that the price it proposed to charge for material reflected only the direct cost to EPS of the material plus the cost to EPS of handling the material. The financial analysis indicated that the only profit which EPS proposed to earn derived from the furnishing of labor. Since, however, contracting officials calculated that the cost to EPS, exclusive of profit, of furnishing an average hour of installation labor would be $15.46, nearly $2 more than the $13.50 per hour it proposed to charge the government, since the solicitation included an estimate that approximately 252,000 hours of installation labor would be required for each of the base and 2 option years, the analysis indicated that EPS could lose approximately $500,000 per year if awarded a contract for block A. Moreover, it appeared that EPS' losses might exceed this estimate since it did not take into account the interest cost to EPS of borrowing the money required in order to prepare for and to perform the contract.

Although the analysis indicated that approximately $2.1 million in credit might be available to EPS from a parent corporation, Tadiran Ltd. of Israel, and from other sources, contracting officials noted that a recent EPS financial statement indicated that the firm's liabilities already exceeded its assets by approximately $12,000. They therefore concluded that EPS was unable to absorb potential losses of $500,000 per year, stating that "a very substantial risk of contract nonperformance and default exists were block A to be awarded to EPS."

Accordingly, on July 23, the contracting officer made a tentative determination that EPS was nonresponsible for block A.

Meanwhile, DCASMA was conducting a general preaward survey in the United States, meeting with representatives of EPS on July 25. That survey indicated that EPS was a wholly owned, but separately incorporated, subsidiary of Numax Electronics Inc. (Numax), which in turn was owned by Tadiran Inc., which in turn was owned by Tadiran Ltd. of Israel (Tadiran), a firm with a net worth of $212 million. While acknowledging that EPS' liabilities exceeded its assets by $1318, the survey team noted that some of the firm's debt was owed to Numax and that under a subordination agreement with Numax no demand for payment could be made such as would reduce the debt to Numax below $210,000. The survey team therefore concluded that EPS' capital was $210,000 greater than the firm's financial statement indicated, for a net worth of $208,682. Further noting that EPS had received loans or had available credits exceeding $2 million dollars, the survey team concluded that the firm possessed the financial resources or the ability to obtain such resources necessary to finance performance. Accordingly, DCASMA recommended award to EPS.

Although the contracting officer did not receive the written DCASMA survey report until after making award to the next low offeror, Siemens/AT&T, on July 26, the Army reports that he spoke with representatives of DCASMA on two separate occasions and was informed of the results of the DCASMA survey prior to award.

In documenting his decision to find EPS nonresponsible for block A, the contracting officer recognized that a firm's submission of a below-cost offer does not necessarily preclude it from receiving award. See Alan Scott Industries, B-219096, June 20, 1985, 85-1 C.P.D. ¶ 706. Nevertheless, he determined that EPS was in fact nonresponsible because, in part, it lacked adequate financial resources to successfully perform a contract for block A. In particular, he noted (1) that EPS was a small firm whose assets of $746,775 were already exceeded by its liabilities of $747,878, (2) that EPS would have to rely on borrowed money to finance the start-up costs, any losses, and the approximately $1,500,000 of work likely to be outstanding under a normal billing cycle, (3) that a significant decline in the value of the dollar, in which payment would be made, versus the German mark, in which much of EPS' costs would be incurred, could have a significant negative cost impact on EPS' financial position, and

(4) that, most importantly, EPS was likely to lose at least $500,000 per year, exclusive of interest expenses on the loans required for performance and any additional costs as a result of a decline in the value of the dollar.

As additional factors in support of his determination of EPS' nonresponsibility for block A, the contracting officer cited his concerns (1) that since the solicitation only provided for a 21-day startup period, EPS might be unable to timely meet its goal of increasing EPS' total workforce by nearly 80 percent and nearly tripling its workforce in Germany through the hiring of American citizens residing in Germany, (2) that turnover among these new employees was likely to be high, resulting in poor quality work and performance delays, due to their low pay, the expiration of their visas, or the rotation to other assignments of their American spouses, (3) that obtaining the necessary German business and DBP licenses would result in an unacceptable delay of approximately 4 months, (4) that EPS' proposed office and warehouse space was inadequate, and (5) that EPS, incorporated only in December 1983, lacked experience with a contract of this scope and value.

As previously indicated, EPS' offer for block B had been excluded from the competitive range. The contracting officer instead made award to Siemens/AT&T as the low offeror for this block.

For block C, the contracting officer determined that Siemens/AT&T's proposal offered an evaluated cost to the government of $1,128,010.73, while EPS' proposal offered an evaluated cost of $1,533,964,10. Accordingly, award was made to Siemens/AT&T as the low offeror for block C.

In evaluating the second BAFO's for block D, the contracting officer determined that EPS had omitted from its offer bill of material No. 7, which listed the cable and cable duct required under items Nos. 0010AA (base year), 0020AA (first option year), and 0030AA (second option year) for the Army's estimated yearly requirement of 80 inside cable distribution systems. Since EPS neither included bill of material No. 7 in its second BAFO nor, as did some other offerors, transferred its total price to the government for the material required for each system from the bill of material to the corresponding items in the schedule of items, the contracting officer considered EPS' second BAFO for block D to be unacceptable due to the lack of essential material prices.

Moreover, although the evaluated cost of EPS' second BAFO for block D would have been only $5,293,812.80, or $1,425,938.53 less than Siemens/AT&T's next low offer of $6,719,751.33, if, as it did for the basic material cost prices in its other bills of material, EPS had carried forward unchanged the basic material list prices as they appeared in bill of material No. 7 in its first BAFO, the contracting officer nevertheless determined that it was not in the government's interest to reopen negotiations for block D in order to permit EPS to submit a third BAFO. He believed that there was a "strong possibility" that EPS would be found nonresponsible for block D since EPS had offered the same installation labor rate of $13.50 per hour for that block as it did for block A. In addition, he noted that several offerors had indicated that their material prices would increase if award was not made by July 31. Accordingly, on July 26, award was made to Siemens/AT&T as the low, acceptable offeror for block D.

EPS thereupon filed this protest with our Office against the award to Siemens/AT&T for all blocks under the solicitation.

Access to Procurement Information

EPS initially complains that the Army has denied it access to certain information and documents which the protester believes would be useful in the development of its bid protest. In particular, we note that the Army has requested us not to provide to EPS certain documents which it submitted to our Office in the administrative report responding to this protest, including the contract schedule and other documents revealing the detailed item-by-item prices offered by Siemens/AT&T and the technical evaluations of offers. We understand the Army to consider this material to contain procurement sensitive information, the release of which could inhibit future internal agency deliberation and result in competitive prejudice in the event our Office sustained EPS' protest and recommended recompetition.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), provides in pertinent part that:

> "(f) Within such deadlines as the Comptroller General prescribes, upon request each Federal agency shall provide to an

> interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this section) that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive."

31 U.S.C. § 3553(f). The contracting agency has the primary responsibility for determining which documents are subject to release under the above provision, and we will not question that determination in the absence of a showing of fraud or bad faith on the part of contracting officials. No such showing has been made here. See Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 C.P.D. ¶ ____; Employment Perspectives, B-218338, June 24, 1985, 85-1 C.P.D. ¶ 715. We have, however, reviewed the documents in question and we base our decision on the entire record, not merely on those portions of it which have been provided to the protester.

Date Of Award

EPS argues that the July 26 award to Siemens/AT&T was premature since the contracting officer had not yet obtained the necessary business clearance and command approval for award. EPS contends that since the "legal contract award date," the date on which the contracting officer secured the final clearance and approval necessary for award, could not have been earlier than July 31, EPS' August 7 initial protest was in fact made within 10 days after the legal date of award and, pursuant to the stay provisions of CICA, the Army therefore should have directed Siemens/AT&T to cease performance pending a decision from our Office.

The stay provisions of CICA require a federal agency to direct a contractor to cease performance where the contracting agency receives notice of a protest within 10 days of the date of contract award unless the head of the responsible procuring activity makes a written finding either that contract performance is in the best interests of the United States or that there are urgent and compelling circumstances significantly affecting the interests of

the United States which do not permit waiting for a decision. 31 U.S.C. § 3553(d). Where the agency allows performance to continue without a finding of urgent and compelling circumstances, we must recommend any required corrective action without regard to any cost or disruption from terminating, recompeting or reawarding the contract. 31 U.S.C. § 3554(b)(2).

We note, however, that the Army, in response to a protest filed on August 2 by San/Bar Corporation, another offeror under this solicitation, has already determined that urgent and compelling circumstances that significantly affect the interests of the United States do not permit waiting for a decision from our Office. Accordingly, we fail to see how the allegedly premature award prejudiced EPS.

Disclosure Of Prices

EPS complains that its prices were known in the marketplace immediately after the firm submitted its initial proposal on January 19, its first BAFO on April 23 and its second BAFO on June 27. The contracting officer, on the other hand, doubts that the government was responsible for the alleged disclosures, observing that EPS' prices were kept in a locked file cabinet and that only himself and the contract specialist had access to EPS' price information for most of the procurement process. Under the circumstances, we see no reason to blame the government for the possible unauthorized disclosure of EPS' prices.

Responsibility

EPS denies that it was nonresponsible for block A. EPS also argues that the contracting officer improperly ignored not only the favorable DCASMA survey results, which included a reference to a July 25 $1 million letter of credit from a New Jersey bank, but also the responsibility that Tadiran as a holding or parent company bears for the actions of its divisions and the financial resources of EPS' proposed subcontractors. EPS denies that it would lose $500,000 per year if awarded a contract for block A, claiming that it will instead earn a profit of $270,000 the

first year. EPS maintains that its cost for installation labor would at most total no more than $13.71 per hour and probably no more than $13.11 per hour. We note that EPS includes in these totals a 15 percent profit on that portion of the labor which would be provided by EPS itself rather than by its German subcontractor, Telefonbau and Normalzeit GmbH (T&N).

FAR provides that to be determined responsible a prospective contractor must have adequate financial resources, or the ability to obtain them, to perform the contract. FAR § 9.104-1(a). Thus, whether the low offeror can successfully perform the contract in view of its financial position and the proposed price has been considered a matter of the responsibility of the offeror. See Neal R. Gross and Company, Inc., B-217508, Apr. 2, 1985, 85-1 C.P.D. ¶ 382; Raycomm Industries, Inc., B-182170, Feb. 3, 1975, 75-1 C.P.D. ¶ 72; Stewart-Thomas Industries, Incorporated, B-174970, Feb. 29, 1972; Lear and Scoutt, 39 Comp. Gen. 895, (1960).

As a general matter, our Office will not question a contracting officer's nonresponsibility determination unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. Lithographic Publication, Inc., B-217263, Mar. 27, 1985, 85-1 C.P.D. ¶ 357.

The fact that the contracting officer found EPS to be nonresponsible for block A does not suggest that he improperly failed to take into consideration the results of the DCASMA survey in the United States. The record suggests that the DCASMA survey team was unaware of and thus failed to take into consideration significant information available to contracting officials in Germany, including the expected EPS loss of approximately $1,500,000 over 3 years, exclusive of interest costs or losses resulting from currency fluctuations. As for the letter of credit mentioned in the DCASMA report but allegedly ignored by the contracting officer, we note that the commitment in the letter of credit was contingent upon EPS receiving a contract in the amount of $25 million. Since EPS' offer for block A totaled $16,270,910, the letter of credit by its terms was not effective in the event of an award for

block A alone. Finally, we note that, in any case, a contracting officer is not bound by a DCASMA report but instead must himself make the final determination regarding a proposed contractor's responsibility based not only upon the preaward survey but also on other information available to him. See Bellevue Bus Service, Inc., B-219814, Aug. 15, 1985, 85-2 C.P.D. ¶ 176.

EPS has failed to demonstrate that the contracting officer improperly disregarded EPS' ties to Tadiran. As previously indicated, the German financial analysis of EPS' offer in fact included credit available from Tadiran in its calculation of the credit available to EPS. As for the possibility of further assistance from Tadiran, we note that FAR provides that affiliated concerns--i.e., where one concern controls or possesses the power to control another concern--are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. FAR §§ 9.104-3(d), 19.101. This may reflect the general principle that since a corporation is a legal entity separate and distinct from its stockholders, the stockholders of the corporation are generally not liable on a contract made by the corporation. See FMC Finance Corp. v. Murphreee, 632 F.2d 413 (5th Cir. 1980); DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976); Penick v. Frank E. Basil, Inc. of Delaware, 579 F. Sup. 160 (D.D.C. 1984); George A. Davis, Inc. v. Camp Trails Co., 447 F.Sup. 1304 (E.D. Pa. 1978). Accordingly, in the absence of a formal, clearly binding written commitment on the part of Tadiran to further guarantee and financially support EPS' performance on a contract for block A, we will not question the contracting officer's actions in considering EPS and Tadiran to be separate entities when determining EPS' responsibility. See Pope, Evans and Robbins, Inc., B-200265, July 14, 1981, 81-2 C.P.D. ¶ 29 (insufficient assurance that parent corporation would provide financial backing to subsidiary corporation for contract term).

Nor has EPS demonstrated that the contracting officer improperly disregarded what EPS describes as the "substantial financial resources" available to EPS through its "subcontracting/teaming arrangement." Both the DCASMA preaward survey and the German financial analysis refer to

and take into consideration credit available from EPS' proposed suppliers. Moreover, EPS itself appears to consider these firms to be mere potential subcontractors, having entered into "Formal Subcontracting Agreements" with them in which it is recognized that the agreement "does not constitute a joint venture, partnership, or other formal business organization" and that each firm "shall act as an independent contractor . . . [without] the authority to bind the other except to the extent bound herein." We note that subcontractors normally are not in privity with the government, see also General Services Administration -- Request for Advance Decision, 62 Comp. Gen. 633 (1983), 83-2 C.P.D. ¶ 402, and EPS has pointed to no formal, clearly binding written commitment on the part of the proposed subcontractors to guarantee EPS' performance and to make available any definite level of financial resoures other than the credit already considered in the DCASMA survey and in the German financial analysis.

We have examined both EPS' calculations regarding its cost of providing installation labor under block A, allegedly $13.11 to $13.71 per hour including some profit, and the calculations relied upon by contracting officials in estimating a labor cost of approximately $15.46 per hour, exclusive of profit, nearly $2 per hour more than the $13.50 per hour EPS proposes to charge the government. A substantial portion of this disparity in calculations apparently results from differing assumptions in three areas.

EPS proposes to use employees of its German subcontract--T&N--to provide part of the required installation labor. While the Army recognizes that most of the installation hours will nevertheless be performed by EPS employees, it assumes that T&N will supply a larger percentage of the installation labor than is attributed to the firm in EPS' calculation of its labor costs. The percentage of the installation labor that will be supplied by T&N rather than by EPS is significant because nearly all of the EPS employees involved in installation will be less skilled personnel paid significantly less than the more highly skilled personnel to be supplied by T&N. We note that the information supplied by EPS indicates that the cost to EPS per hour of installation labor supplied by T&N will be on average 70 to 90 percent higher than the total,

fully burdened cost to EPS--exclusive of profit--per average hour of installation labor supplied by EPS.

EPS' claim that it will not lose money on a contract for block A alone apparently also assumes that the cost per hour of installation labor for overhead and general and administrative expenses will remain virtually the same as initially proposed for all four blocks even though the labor base would be reduced from the approximately 399,200 hours of installation labor per year required for all four blocks to the 252,000 hours per year required for block A alone. In other words, we understand EPS to be arguing that it can achieve, without adversely affecting the timeliness and quality of its performance, a decrease in overhead and general and administrative expenses roughly proportionate to the 36.9 percent decrease in the labor base.

By contrast, the Army assumes that certain expenses associated with overhead and general and administrative expenses are relatively inelastic and that, therefore, any decrease in overall overhead and general and administrative expenses would not be proportionate to, but instead would be less on a percentage basis than the reduction in the labor base. Accordingly, the Army expects that the overhead rate and the general and administrative expenses rate per hour of labor would increase if EPS received award only for block A.

EPS has failed to demonstrate that it was unreasonable for the Army to assume that T&N will play a larger role in installation than attributed to it in EPS' calculation of its labor costs. On the contrary, EPS itself, in announcing in its first BAFO the recent addition of T&N to its proposed subcontractors, emphasized the important role to be played by T&N. EPS noted that T&N employed over 6,000 people in its installation force and specified that each installation team would include one EPS full-time supervisor with "the remainder of the team as local German labor from the firm TN."

Nor has EPS demonstrated that the Army lacked a reasonable basis for assuming that, in view of the relatively inelastic nature of many overhead and general and administrative expenses, any decrease in such expenses would be less than the decrease in the labor base, thus increasing the overhead rate and general and administrative expenses rate per hour of installation labor for block A.

We note that EPS, in its comments on the administrative report, alleges that the estimate in the solicitation that 252,000 hours of installation labor per year would be required under block A is excessive. Since, however, our Bid Protest Regulations require protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals to be filed prior to that closing date, 4 C.F.R. § 21.2(a)(1), this allegation is untimely.

Accordingly, we conclude that EPS has failed to carry its burden of demonstrating that the contracting officer lacked a reasonable basis for determining that EPS lacked adequate financial resources to successfully perform a contract for block A. Since this in itself justified the determination of nonresponsibility, we need not consider EPS' contentions concerning its ability to meet applicable German license requirements in a timely manner, the adequacy of its proposed workforce, office space, and warehouse space, and the significance and relevance of its prior experience. Nor will we consider EPS' allegations of purported procedural irregularities in the preaward surveys and the nonresponsibility determination.

Technical Acceptability

As previously indicated, EPS' initial protest to the agency concerning the April 12 exclusion of its proposal from the competitive range for block B (for failure to meet technical requirements set forth in the solicitation) was denied by decision of April 18 on the grounds that EPS' proposal did not have a reasonable chance of being selected for award. In response to EPS' subsequent July 29 Freedom of Information Act (FOIA) request, the Army provided EPS by letter of August 7 portions of the memorandum documenting the contracting officer's competitive range determination for block B. We note that the memorandum in question identifies the deficiencies found in EPS' proposal.

In its August 7 protest to our Office, EPS generally denied that its offer for block B was technically unacceptable. Moreover, EPS argues that the Army acted improperly in rejecting EPS' offer after having included it in the competitive range for that block and without having first afforded the firm the opportunity of submitting a BAFO. We note that EPS denies that the March 19 questions submitted to the offerors and their subsequent answers constituted discussions.

As previously indicated, however, our Bid Protest Regulations require that protests be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier, 4 C.F.R. § 21.2(a)(2), and that where a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3). Accordingly, to the extent that EPS' allegations concerning block B are based on information forming the basis of its initial agency protest or otherwise available to EPS in April, such allegations are untimely.

We note that EPS, which indicates that the "first time deficiencies [in EPS' offer for block B] are mentioned by the Government are in its letter of August 12, 1985, in response to an FOIA request by EPS," generally argues that the "receipt of FOIA responses make a number of protester's claims timely" since EPS protested within 10 days of the receipt of such information. Protesters, however, have a duty to diligently pursue information which forms the basis of their protests within a reasonable time. Since EPS apparently did not file an FOIA request until more than 3 months after the April 18 denial of its initial protest to the agency, we conclude that EPS did not diligently pursue the information. See Knox Manufacturing Co.--Request for Reconsideration, B-218132.2, Mar. 6, 1985, 85-1 C.P.D. ¶ 281.

EPS further argues that even if its protest as it relates to the exclusion of its offer from the competitive range for block B is untimely, nevertheless, we should consider the merits of its allegations under the significant issue or good cause exception to our timeliness rules. 4 C.F.R. § 21.2(c). We do not agree. In order to prevent the timeliness requirements from becoming meaningless, the significant issue exception is strictly construed and seldom used. This exception is therefore limited to considering untimely protests that raise issues of widespread interest to the procurement community and which have not been previously considered. See Stalker Brothers Inc., B-217580, Apr. 26, 1985, 85-1 C.P.D. ¶ 476; Knox Manufacturing Co.--Request for Reconsideration, B-218132.2, supra, 85-1 C.P.D. ¶ 281 at 2. We have previously considered the exclusion of an offer from the competitive range. See Metric Systems Corp., B-218275, June 13, 1985, 85-1 C.P.D. ¶ 682. The good cause exception

is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a protest. See Stalker Brothers Inc., B-217580, supra, 85-1 C.P.D. ¶ 476 at 3; Knox Manufacturing Co.--Request for Reconsideration, B-218132.2, supra, 85-1 C.P.D. ¶ 281 at 2. That is not the case here.

Evaluation of Prices

EPS also protests the award to Siemens/AT&T for block C, alleging that EPS was the low offeror for that block. In addition, by letter received at our Office on October 22, EPS notes that the Army's September 24 letter to our Office indicates that item No. 0009AA of block C for line/trunk conditioning equipment, was to be evaluated. EPS points out that amendment No. 4 provides that item No. 0009AA would be evaluated "by review of the price lists submitted and any discount offered for the basic system components of each configuration described." Although the technical specifications set forth the salient technical capabilities which must be provided by the line/trunk conditioning equipment provided by the contractor (and both EPS and Siemens/AT&T proposed specific pieces of equipment to meet the agency's requirement for line/trunk conditioning equipment), EPS argues that the "configuration" of the system was not described in the solicitation and that therefore the Army could not evaluate prices for item No. 0009AA.

In response, the Army denies that EPS was the low offeror for block C. As for item No. 0009AA, the Army explains that the proposed equipment was reviewed for technical sufficiency and the offered prices evaluated in determining the low offeror for block C.

We have examined the second BAFO's submitted by EPS, Siemens/AT&T, and San/Bar Corporation, the third offeror for block C, and we will not question the agency's determination that EPS did not submit the low offer for block C when item 0009AA prices are included in the evaluation.

Although we recognize that EPS objects to the evaluation of prices for item No. 0009AA, the line/trunk conditioning equipment, we consider its protest in this regard to be untimely. By letter of August 7, the Army informed EPS that its base year prices for block C were evaluated as totaling $483,754.90. We believe that in

view of EPS' proposed prices, EPS should have known, as of the receipt of this letter, that the Army had evaluated the prices of EPS' proposed line/trunk conditioning equipment in determining EPS' total price for block C. In any case, we note that the Army's September 24 letter to our Office, stating that item No. 0009AA prices had been evaluated, indicated that a copy of the letter had been sent to EPS. Allowing a reasonable time for receipt by EPS, see McGraw-Edison Co. and ASEA Electric, Inc., B-217311, B-217311.2, Jan. 23, 1985, 85-1 C.P.D. ¶ 93 (receipt within 1 week assumed), it would appear that EPS was on notice that the Army had evaluated item No. 0009AA prices more than 10 working days prior to the October 22 receipt by our Office of EPS' arguments in this regard and thus that the arguments are untimely. 4 C.F.R. § 21.2(a)(2).

Omission of Prices

EPS also protests the rejection of its second BAFO for block D as a result of its failure to include bill of material No. 7, in which offerors were required to specify the list price of cable and cable duct for the inside cable distribution systems required under block D. EPS had included bill of material No. 7 in its first BAFO but not in its second BAFO.

EPS initially contends that the Army should not have even requested a second round of BAFO's. Although EPS warned contracting officials prior to the closing date that the request "could be the subject of a protest," it did not actually file a protest concerning this issue--an apparent impropriety incorporated into the solicitation--until September 4, well after the June 27 closing date for receipt of the second BAFO's. Its protest in this regard is therefore untimely. 4 C.F.R. § 21.2(a)(1).

EPS next alleges that it had intended to offer in its second BAFO the same list prices for the basic material required under block D as it had offered in its first BAFO. In support of its allegation, EPS notes that the list prices for the basic material in the three bills of material which were included in both EPS' first and second BAFO's remained the same. EPS argues that the omission of bill of material No. 7 from its second BAFO either should have been treated as a minor informality or irregularity or should have been corrected as a mistake in its proposal.

EPS does not deny that the material for which no price was offered was an essential and integral part of the Army's overall requirement as set forth in block D. We note that the omitted prices constituted in excess of 15 percent of what would have been EPS' total price for block D had it carried forward unchanged the prices in bill of material No. 7 in its first BAFO. Accordingly, the omission of the prices cannot be viewed as a minor informality. See E.H. Morrill Company, 63 Comp. Gen. 348 (1984), 84-1 C.P.D. ¶ 508; but cf. Leslie & Elliott Company, 64 Comp. Gen. 279 (1985), 85-1 C.P.D. ¶ 212.

Further, section 15.607 of FAR provides specific procedures for a contracting officer to follow when a mistake is suspected or alleged before award in a negotiated procurement. In general, these procedures contemplate that the mistake will be resolved through clarification or discussions. FAR, § 15.607(a) and (b). Discussions are required if communication with the offeror whose bid may be mistaken prejudices the interest of other offerors, FAR § 15.607(a), or if correction requires reference to documents, worksheets, or other data outside the solicitation and the proposal in order to establish the existence of the mistake, the proposal intended, or both. FAR § 15.607(c)(5). See American Electronic Laboratories, Inc., B-219582, Nov. 13, 1985, 65 Comp. Gen. ____, 85-2 C.P.D. ¶ ____.

The Army maintains that correction of the omission in EPS' proposal would have required reopening discussions and calling for a third round of BAFO's. Since the requested correction--the carrying forward of the material prices in bill of material No. 7 as included in EPS' first BAFO--would have required reference to a document--EPS' first BAFO--outside EPS' current proposal in order to establish the existence of the intended prices for the material required under block D, we will not question the agency's determination that correction would have required reopening discussions.

Nor will we question the contracting officer's determination not to reopen discussions. As previously indicated, the contracting officer concluded that reopening discussions would not be in the best interests of the government because there was a "strong possibility" that EPS would be found nonresponsible for block D and several

offerors had indicated that their material prices would increase if award was not made by July 31. Moreover, we note that we have previously held that an agency need not reopen discussions after a BAFO to remedy a deficiency first introduced in the BAFO. See also Employment Perspectives, B-218338, supra; 85-1 C.P.D. ¶ 715 at 13; Information Management, Inc., B-212358, Jan. 17, 1984, 84-1 C.P.D. ¶ 76; Sperry Univac, B-202813, Mar. 22, 1982, 82-1 C.P.D. ¶ 264.

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel