

DECISION



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

FILE: B-221325, B-221326

DATE: March 21, 1986

MATTER OF: ITT Telecom Products Corporation

DIGEST:

1. GAO will review subcontractor protests where the subcontracts are awarded by general agents operating government facilities under government direction, thus making the contracts fall within the category of awards made by or for the government.
2. Protests against alleged improper disclosure of pricing information are untimely when filed more than 10 days after the protester learns of the disclosure and after bid opening and contract award of later similar solicitations.
3. Untimely protest will not be considered under the significant issue exception to GAO's timeliness rules where the procurement format giving rise to the protest occurs infrequently and the issue raised--alleged improper price disclosure--has been considered previously. The good cause exception is not for application where there is no allegation or showing that some compelling reason beyond the protester's control prevented the timely filing of the protest.

ITT Telecom Products Corporation (ITT) protests the award of contracts to Comsat Telesystems, Inc. (Comsat), for satellite communication systems (SATCOM units) under solicitations Nos. M-3189/RFO#85E-0224 and M-3190/RFO#85E-0225, issued respectively by Farrell Lines, Inc. (Farrell), and American Foreign Shipping Co. (AFS), as general agents for the United States Department of Transportation, Maritime

034893

Administration (MARAD). ITT alleges that MARAD improperly disclosed ITT's bid to Comsat for the same SATCOM units under a prior solicitation issued by Marine Transport Lines (MTL), giving Comsat an unfair competitive advantage.

We dismiss the protest.

As a threshold matter, MARAD asserts that since the solicitations were issued by and awards were made by the above-listed general agents, this is a subcontract protest which is not for consideration by GAO under our Bid Protest Regulations, 4 C.F.R. § 21.3(f)(10) (1985). We disagree. This regulation and our decisions make it clear that where the subcontract at issue is by or for the government, our Office will consider the protest. Here, by MARAD regulation, the companies which conducted these procurements are entities designated as general agents under a standard form of Service Agreement to manage and conduct the business of vessels of which the United States is owner. 46 C.F.R. part 315, § 1(a) (1985). The SATCOM units being procured were for the operation of these government-owned vessels by the general agents under specific direction by MARAD to acquire the equipment. This is essentially identical to the "GOCO" (government-owned, contractor-operated) procurements which our Office has considered as reviewable protests since they are "by or for" the government. BECO Corp., B-219651, Nov. 26, 1985, 85-2 C.P.D. ¶ 601; Ellis & Watts, B-219360, Aug. 20, 1985, 85-2 C.P.D. ¶ 202.

MARAD also contends that the ITT protest is untimely. The procurements in question arose from a standard for SATCOM units and high frequency radioteletype systems which was issued by MARAD in August 1985 and revised and reissued in October 1985. As required by its contract with MARAD, MTL issued a solicitation for competitive bids. On October 23, 1985, after selection by MTL on the basis of its low bid and approval by MARAD, ITT was awarded this contract at a price of \$23,250. Comsat had bid \$25,000. In response to an inquiry from Comsat the day after award, MARAD disclosed ITT's bid price to Comsat. Upon learning of the disclosure, ITT complained to MARAD by letter dated October 28, objecting that its contract with MTL was a private commercial contract, although funded by MARAD, and the price was private commercial data which should have been kept confidential by MARAD. ITT did not protest,

however, and stated merely that "should these actions cause us to incur a competitive detriment on future procurements, we will be required to take appropriate action."

On September 3, Farrell and AFS issued solicitations for the same equipment for which the price disclosure had been made. ITT and Comsat both participated in these procurements; ITT's bids were submitted during the first week of November. On December 11, awards were made under both solicitations and, upon learning that it had received only a partial award, not including the SATCOM units, ITT protested to our Office. Comsat had received both SATCOM awards on the basis of its low bids of \$22,700.

We find the protest is untimely. In order to be timely, ITT should have protested within 10 days of learning of the price disclosure, its protest basis, under 4 C.F.R. § 21.2(a)(2), or, at the latest, prior to bid opening of the Farrell and AFS solicitations, under 4 C.F.R. § 21.2(a)(1). Instead of so filing, ITT elected to advise the government of the alleged impropriety without request for any relief and continued to participate in the two allegedly compromised procurements. In essence, ITT sought to retain the option of first determining whether or not it had been awarded the contracts under the two later solicitations and, if not successful, then protesting award to another firm on the basis of the alleged impropriety of which ITT was previously aware. See East Bay Auto Supply, Inc.; Sam's Auto Supply, 53 Comp. Gen. 771, 773 (1974), 74-1 C.P.D. ¶ 193.

In addition, in order to attempt to establish the materiality of the disclosure, ITT asserts that all of the awards under the various prime contractor procurements were part of a unitary procurement derived from the initial standard issued by MARAD. If one accepts this view, then once ITT learned that the MTL procurement had been awarded and ITT's price disclosed, ITT should have protested that the remainder of the procurement had been compromised by the premature disclosure and objected to the failure to establish common closing dates or bid opening dates under the various solicitations. Once again, ITT was required to file such a protest either within 10 days after learning of the disclosure or, at the latest, before the next bid opening date. ITT did neither.

ITT attempts to explain its failure to protest by asserting that no remedy was available at the time it learned of the price disclosure. ITT's speculation regarding the nature of the remedy which our Office might fashion does not relieve ITT of its obligation to timely protest under our Bid Protest Regulations. Had we determined that there had been improper disclosure and prejudice, we have broad discretion under our Regulations to recommend whatever remedy we determine necessary to insure that awards will comply with statute and regulation. 4 C.F.R. § 21.6(a)(6).

ITT argues that even if its protests are untimely, they should be considered 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 limited to considering untimely protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. Emerson Electric Co.-- Reconsideration, B-220517.2, Nov. 26, 1985, 85-2 C.P.D. ¶ 607. Here, the protest arises only in the context of a relatively infrequently used procurement methodology; moreover, the issue of the propriety of price disclosure is one which we have previously considered. E.g. Kisco Co., Inc., B-216646, Jan. 18, 1985, 85-1 C.P.D. ¶ 56. The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevents the protester from filing a protest. Engineering and Professional Services, B-219657; B-219657.2, Dec. 3, 1985, 85-2 C.P.D. ¶ 621. This is not the case here.

The protest is dismissed.



Robert M. Strong
Deputy Associate
General Counsel