

DOCUMENT RESUME

03285 - [A2233346]

[Protest against the Inclusion of the Buy American Act Provision in Certain Solicitations]. B-188585. August 10, 1977. 5 pp.

Decision re: Bernard Cap Co., Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Defense Logistics Agency.

Authority: Buy American Act. 31 U.S.C. 71. 31 U.S.C. 74. 4

C.F.R. 20.2(b)(2). B-184634 (1975). B-183670 (1976).

B-185175 (1976).

The protester objected to the inclusion of the Buy American Act provision in solicitations for the procurement of military berets. The protester also alleged that contracts were awarded for berets which will not meet the applicable military specifications. The protest concerning the solicitation was untimely and was not considered on its merits. It appeared that the procured berets will meet the military specifications. GAO will not consider protests which do not involve the expenditure of appropriated funds. (Author/SC)

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DECISION



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

FILE: B-184585

DATE: August 10, 1977

MATTER OF: Bernard Cap Company, Inc.

DIGEST:

1. Protest concerning inclusion of Buy American Act provision in various solicitations which was not filed prior to bid opening is untimely and not for consideration on merits.
2. While generally publication of award in Commerce Business Daily (CBD) is constructive notice of basis of protest, where protester questions responsibility of awardee and record is not clear when basis of protest was known or should have been known to protester, protest is not untimely under 4 C.F.R. § 20.2(b)(2) (1977), despite fact that notice of award may have been promptly published in CBD and protester filed protest more than 10 days after publication.
3. GAO bid protest jurisdiction is based on its authority to adjust and settle accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. §§ 71, 74 (1970). Accordingly, where procurement does not involve expenditure of appropriated funds, as in the case of foreign military sale, GAO will not render decision on matter.
4. GAO has discontinued its review of protests involving affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or solicitation contains definitive responsibility criteria which allegedly have not been applied. Assuming, arguendo, that military specification which

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required that berets be produced on knitting machine having 9 or 10 needles per inch as definitive responsibility criterion requirement appears to have been met where measurement by procuring activity confirms that awardee's knitting machines have 9 needles per inch.

Bernard Cap Company, Inc. (Bernard), protests the inclusion of the Buy American Act provision in certain solicitations issued by the Defense Logistics Agency (DLA) for the procurement of military berets. Bernard also protests the award of contracts under these solicitations for berets which will be made on an 8 cut knitting machine, i.e., a knitting machine having 8 needles per inch, and the acceptance of berets made on an 8 cut machine. Bernard correctly states that the applicable military specifications require that the berets be knitted on an 18 gauge, 9 or 10 cut, flat or circular reciprocating beret machine.

A summary of the protested procurements follows:

"a. IFB DSA100-77-B-0331, opened 2-14-77 for 37,584 berets. Contract DSA100-77-C-0878 awarded to Bancroft on 3-4-77 - \$138,309.

"b. IFB DSA100-77-B-0037, opened 11-22-76 for 15,348 berets. Contract DSA100-77-C-0590 awarded to Bancroft on 12-15-76 - \$50,955.

"c. IFB DSA100-76-B-1494, opened 10-18-76 for 29,172 berets. Contract DSA100-77-C-0579 awarded to Bancroft on 12-10-76 - \$108,812.

"d. IFB DSA100-76-B-1222, opened 8-6-76 for 473,660 berets(FMS). Contract DSA100-76-C-0103 awarded to Bancroft on 9-29-76 - \$1,534,658.

"e. IFB DSA100-76-B-1182, opened 7-23-76 for 11,376 berets. Contract DSA100-76-C-1838 awarded to Bancroft on 8-17-76 - \$43,172."

DLA states that the portion of Bernard's protest dealing with the inclusion of the Buy American Act provision in the solicitations has not been timely filed because Bernard's protest was filed with our Office on March 14, 1977, after the bid opening dates. In support of its contention, DLA refers to GAO's Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), which provide in pertinent part that:

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"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

For the reasons stated by DLA, we conclude that Bernard's protest concerning the inclusion of the Buy American Act provision in the solicitations is untimely and will not be considered on the merits.

DLA also contends that Bernard's protest regarding the award of contracts for military berets is timely only insofar as it relates to solicitation DSA100-77-B-0331, since notification of the awards made under the other solicitations was promptly published in the Commerce Business Daily (CBD), and Bernard protested more than 10 days after publication.

In Rescom Incorporated, B-184634, September 10, 1975, 75-2 CPD 142, we held that publication of award notice in the CBD is constructive notice of the basis of the protest. Consequently, a protest filed more than 10 working days after publication of the award in the CBD is untimely under our Bid Protest Procedures, specifically 4 C.F.R. § 20.2(b) (2) (1977), which provides that:

"* * * bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

However, where, as here, Bernard questions the responsibility of the awardee, i.e., whether the awardee will produce the required berets on 8 cut instead of the specified 9 or 10 cut beret machines, and the record is not clear when the basis of the protest was known or should have been known to Bernard, we cannot find that the protest is untimely under 4 C.F.R. § 20.2(b)(2) (1977), despite the fact that notice of award may have been promptly published in the CBD and Bernard may have filed its protest more than 10 days after such publication.

DLA states that the procurement made under IFB DSA100-76-B-1222 was for a foreign military sale. We have consistently declined to consider protests involving foreign military sales because the procurements do not involve the expenditure of appropriated funds and our bid protest jurisdiction is based on our authority to adjust and settle accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. §§ 71, 74 (1970). Accordingly, where a procurement does not involve the expenditure of appropriated funds, as in the case of a foreign military sale, we will not render a decision on the matter. Tele-Dynamics Division of AMBAC Industries, B-183670, January 29, 1976, 76-1 CPD 60.

With regard to the responsibility issue, DLA and the awardee state that Bernard is challenging DLA's affirmative determination of the awardee's responsibility, and, with certain exceptions not relevant here, GAO has consistently declined to review protests questioning such determinations. In support of this proposition, the awardee cites our prior decision in Unitron Engineering Co., B-185175, April 7, 1976, 76-1 CPD 231, where we declined to consider an allegation that a bidder lacked equipment required for contract performance. In that decision, we stated that this Office has discontinued its review of protests involving affirmative determinations of responsibility unless fraud is alleged on the part of the procuring officials or the solicitation contained definitive responsibility criteria which allegedly have not been applied. DLA and the awardee also state that whether the awardee will properly perform under the contracts is a matter of contract administration which is not for resolution under GAO's Bid Protest Procedures.

In addition, DLA states that a preaward survey conducted in connection with solicitation DSA100-77-B-0037 and a quality assurance report disclose that the awardee's knitting machines have 9 needles per inch. DLA also states that:

"In recent conversations regarding the Bancroft knitting machines, the QAR [quality assurance representative] has confirmed the accuracy of the measurement he had previously reported. He advised that subsequent to the installation of the machines in early 1976, he personally inspected one to determine how many needles it contained. He explained that the needles were fixed in a circular row around the top of a cylinder approximately six and three-eighths inches in diameter and that a row of 112 needles extended over approximately two-thirds of the circumference of the top. As stated in the report, his measurements around the circumference of the cylinder's top revealed nine needles to the inch."

In support of its contention that the awardee may be producing berets on an 8 cut machine in contravention of applicable military specifications, the protester has submitted descriptive literature from the machine manufacturer which indicates that the awardee's knitting machines have a "Machine Fineness" of 8, which it equates with an 8 cut machine. Another firm, which has not protested to our Office, has made a similar argument, and questioned DLA's measurements as well, in support of the protest.

With regard to the descriptive literature and the protester's assertion, the awardee states that the protester equates "Machine Fineness" with needles per inch and concludes, without any corroborative evidence, that the awardee's machines lack the required number of needles per inch.

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Moreover, as the awardee correctly points out, all other dimensional statistics set forth in the descriptive data are expressed in metric terms. The descriptive data, then, raises more questions than it answers. While there is a dispute as to the accuracy of the measurements, we find no basis in the record to conclude that DLA is incorrect.

Even if we assume, then, that the military specifications establish a definitive responsibility requirement, that is, the knitting machines must have 9 or 10 needles per inch, it appears that the requirement has been met, and there is not sufficient evidence of record to indicate that the awardee has or will deliver noncompliant berets.

Based on the foregoing, the protests are denied.

R. K. Kitten
Deputy Comptroller General
of the United States