

PL II

DECISION



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

9599

FILE: B-193872

DATE: March 30, 1979

DLG 6/386

MATTER OF: Schering Corporation

DIGEST:

1. Protest, alleging inadequate preaward survey of protester's competitor, is dismissed since it ultimately amounts to a protest against contracting agency's affirmative determination of competitor's responsibility and such determinations will not be reviewed by GAO except in limited circumstances not applicable here.
2. Question of whether offeror is manufacturer or regular dealer under Walsh-Healey Act is for determination by contracting agency, subject to review by Secretary of Labor.

Schering Corporation (Schering) protests the Defense Logistics Agency's (DLA) procedures in negotiating the procurement of certain pharmaceutical products under request for proposals (RFP) DLA120-79-R-0042. Specifically, Schering questions the adequacy of DLA's preaward survey of its competitor, Philadelphia Biologics Center (PBC), that firm's qualifications and DLA's determination that PBC qualifies as a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act (Act), 41 U.S.C. § 35 et seq. (1976). The protest is asserted to have been filed as a "protective measure" to preclude award to PBC pending a determination of the firm's "qualifications" to participate in the procurement. "Qualifications" apparently refers to the status of the firm as a manufacturer or regular dealer, which is presently under review at the Department of Labor.

TITLE

DLG 6/386

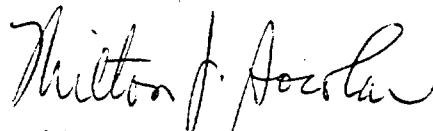
We are dismissing the protest for the following reasons. The complained of preaward survey can only operate to Schering's detriment if it provides the foundation for an affirmative determination of PBC's

004748

responsibility. Here it is unclear from the record whether such a determination has in fact been made by the contracting officer. Nevertheless, even if an affirmative determination of responsibility has been made, we do not review protests of such determinations, except in circumstances not relevant here, see Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64, since these determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must bear the burden of a contractor's inability to perform.

Secondly, we do not consider the status of an offeror as a manufacturer or a regular dealer under the Act because such a matter is by law for the contracting agency's determination in the first instance, subject to the Secretary of Labor's review. Sace Corporation, B-192928, September 27, 1978, 78-2 CPD 240. Although Schering alleges that DLA and the Department of Labor have encountered some difficulty in resolving the issue of manufacturer/regular dealer as it applies to PBC, such matters are not appropriate for our consideration in a bid protest context.

Based on the above, Schering's protest is dismissed and its request for a conference on the merits is denied.



Milton J. Socolar
General Counsel